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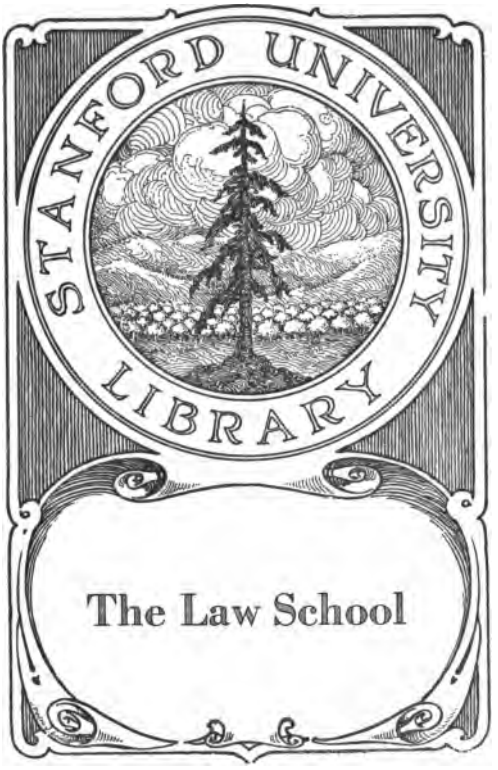
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THE

QUEENSLAND LAW REPORTS.

CASES

IN

EQUITY, COMMON LAW, ADMIRALTY, INSOLVENCY, AND CRIMINAL LAW.

EDITED BY H. R. BEOR, BARRISTER-AT-LAW,

FOR THE

QUEENSLAND LAW SOCIETY,

THE JUDGMENTS REPORTED BY MR. W. H. OSBORNE.

VOL. I.

1876—39 AND 40 VICTORIA.

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HIS HONOUR SIR JAMES COCKLE, KT. ... ... *Chief Justice.*

HIS HONOUR ALFRED JAMES PETER LUTWYCHE ... ... } *Judges of the Supreme Court.*

HIS HONOUR CHARLES LILLEY ... ... } *Judges of the Supreme Court.*

HIS HONOUR EDMUND SHEPPARD ... ... } *Judges of the Supreme Court.*

THE HON. S. W. GRIFFITH ... ... *Attorney-General.*

ROBERT LITTLE... ... ... *Crown Solicitor.*

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CASES

DETERMINED BY

THE SUPREME COURT

IN AND AFTER

HILARY TERM, 39 VICTORIA.

EQUITY.

FISHER *v.* TULLY (*Defendant nominated by the Government.*)
March 14th, 1876.

Crown Lands Alienation Act of 1868—*Right to Deed of Grant of Selection—Specific Performance*—31 *Vict. 46, secs.* 46, 51, 53, 57.

The Plaintiff caused application to be made on his behalf for a lease of certain Crown lands under the provisions of the Statute 31 Vict. 46, and at the same time caused to be deposited with the proper officer a declaration made by himself in the form required by the 53rd section of the Act. A lease for ten years, subject to the conditions prescribed by the Act, was granted to him, and he afterwards obtained from the Commissioner of the district a certificate under the 51st section of the Act, that the conditions had been duly performed. The Plaintiff then paid the balance of the ten years' rent, and applied to the Government for a deed of grant of the land under the 51st section of the Act. The Government not complying, he filed a Bill in the Supreme Court praying for a decree declaring him to be entitled to have a deed of grant in fee-simple of the lands issued to him.

Held that it rested with the Governor in Council to decide whether the Deed of Grant should issue or not, and that the Court could not enforce a grant before the Governor in Council had decided that it should issue.

Held, also, that the Act requires a residence in Queensland on the part of the applicant for a lease, beyond a mere temporary residence at the time of making his declaration.

Statement.

ON the 29th of November, 1869, the plaintiff, by his agent, made application to the proper officer in that behalf to be admitted lessee for ten years of a portion of Crown land open for selection under the provisions of *The Crown Lands Alienation of Act of* 1868. On making the application, the plaintiff's agent handed in to the officer a declaration made by the plaintiff in the form required by the 53rd section of the Act. The declaration, in pursuance

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March 14.

Statement.

of the provisions of the Act, contained the following statement, "I declare that I live in Queensland." A lease of the land applied for was afterwards granted to the plaintiff.

On the 20th of March, 1872, the commissioner for the district where the land was situated issued to the plaintiff, under the provisions of the 51st section of the Act, sub-section 6, a certificate that he had duly performed the conditions of the lease.

On the 7th June, 1872, the plaintiff paid the balance of the ten years' rent due in respect of the land, and applied to the Government for a Deed of Grant in fee-simple of the land, which the Government refused to issue.

The plaintiff's Bill prayed: 1. That it might be declared that a valid and binding statutory engagement was subsisting between the Government and the plaintiff to grant the said land to the plaintiff in fee-simple, and that the plaintiff was entitled to have a deed of grant in fee simple of the said land issued to him; 2. That the Government might be decreed to issue such grant to the plaintiff accordingly, and otherwise to carry into execution the said statutory engagement on their part; 3. Or that the damages which the plaintiff had sustained by reason of the non-performance of the said statutory engagement on the part of the said Government might be assessed, and that the said Government might be decreed to pay such damages to the plaintiff in substitution for such execution.

The plaintiff's affidavits contained statements that the declaration made by him and deposited at the time of making the application for the lease was true; that at the time when he made it he lived in Queensland, and that he had a residence in and frequently visited and resided in the colony.

Harding (*Cooper* with him), for the Plaintiff, cited—

Wellesley *v.* Mornington, 5 W.R., 393; Rawlings *v.* Wickham, 4 J., N.S. 990; Edwards *v.* Spraught, 2 J. and H., 617; Farrell *v.* Davenport, L.T. N.S. 436; Reed *v.* Prest, 2 W.R. 86; Ogilvie *v.* Gregory, 4 W.R. 69; Massie *v.* Burton, 2 H. and N. 597; Reg. *v.* Hughes, 26 L.J., M.C. 26; Taylor *v.* Overseers of St. Mary Abbotts, L.R. 6, C.P. 309; Bond *v.* Overseers of Hanover Sq., L.R. 6, C.P. 312; Thompson *v.* Harvest, 28 L.J., M.C. 165; Reg. *v.* Taylor, 2 Webb's Reports, 23, 29; Chapell *v.*

Samfer, 11 N.S.W.R. 138; A.G. of Victoria *v.* Ettershank, L.R. 6, P.C. 354, 376; Kettle *v.* Regina, 3 W.N. and A.B. Ex., 50, 57; Emery *v.* Barclay, 8 N.S.W. Rep., 374, 379; Blackwood *v.* London Chartered Bank of Australia, L.R. 5, P.C. 92.

Statement.

Blake, Q.C., and *Beor*, for the Defendant, cited—

R. *v.* Duke of Richmond, 6, T.R., 566; McDougal *v.* Patterson, 11 C.B., 755.

Judgment.

THE CHIEF JUSTICE:—

That in the execution of the Act of 1868, the Governor in Council is intended to play an important part is evident from the 5th section of the Act, which provides that "All questions shall be decided by the Commissioner, who shall give his decision in open Court subject to confirmation by the Governor in Council." And again it appears by the 57th section, that after a lessee shall have made the last payment of instalments and fees, he shall be entitled to a grant, provided that he shall prove to the Governor in Council that he has faithfully complied with all covenants and conditions contained in or implied by his lease under the provisions of the Act. Now, if the issuing of the deed in the present case falls within the provisions of that section, this Court has no duty whatever to perform in respect of the matter. It is for the Governor in Council to judge of the interpretation of so much of the Act as relates to his decision under section 57. With him, also, it lies to come to a conclusion upon the facts necessary to such a decision. This Court, if the case falls under section 57, has no power to review the interpretation which the Governor in Council may place upon this portion of the Act, nor to revise his view of the facts upon which the judgment is founded.

Consequently it would be useless in such a case to express any opinion as to some one or more of the points of law which have been raised in this case. For instance, it has been said this necessity for living in the colony is not a condition precedent; but if the case be for the determination of the Governor in Council under section 57, it is for him to say whether or not it be a condition precedent. Matters of interpretation, like matters of fact, are for him. Now, the 51st section is material, so far as this case is concerned, in respect to subsections 5, 6, 7, and 9. I

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think that the argument founded upon the occurrence of the words "his agents or bailiffs," in subsection 5, are insufficient to relieve the plaintiff's case of the difficulty, if such there be, arising out of the meaning put upon the word "live." But we have to go further; and looking into subsections 6 and 7, we see that the plaintiff having obtained a certificate under those subsections, or one of them, and having paid a sum equal to the aggregate amount of the annual rents, claims to be entitled absolutely to a deed of grant. Is he so entitled? Section 57 provides that even after the last payment of instalments and the payment of fees, that there shall be proof made to the Governor in Council of compliance with certain covenants and conditions. It is contended on behalf of the plaintiff that his particular case is not covered by the words of section 57, and that the meaning of that section is to be confined to cases in which the rent has been paid up in ten annual instalments. Now, the words of subsection 9, with reference to the amount, are these:—"A sum equal to the aggregate amount of the annual rents which would become due during the unexpired portion of the term of ten years' lease, together with the amount of the deed fee." It has been contended that the words "last payment of instalments" means the payment of the last of the ten instalments. Now, certainly, the Act does not say so; the words are not "So soon as the lessee shall have made payment of the last of the ten instalments." The words are—"So soon as the lessee shall have made the last payment of instalments." Now, in section 46, wherein the word "instalment" occurs, we find the term "first instalment" made use of, and one would expect to find the words "last instalment" to be used in section 57, if it was intended to contrast the payments mentioned in these respective sections. Moreover, in the three places in which the word "instalment" occurs in section 46, we find that the phrase "annual instalment" is used; consequently it seems to me more probable that in section 57, the Legislature meant the payment of the balance of the rent, than that they meant the payment of the last of ten annual instalments. It is probably the more likely that this was the meaning of the Legislature, when we rest upon mere verbal criticisms; but the moment we look to the reason of the thing, I think the superior claim to notice of the interpretation which I put upon section 57 becomes manifest. Assuming that a man who pays the rent during ten successive years stands on a different footing

from him who pays under the subsections that we have noticed, how widely different are their respective footings! In the one case the Governor in Council is the ultimate judge of what are the requisite conditions; he is the ultimate judge of how far those conditions have been complied with;—in the other case this Court is to judge upon totally different principles, of the nature of the conditions, whether they be precedent or not, and to ascertain their proof by evidence utterly different to that on which the Governor in Council may proceed. He may found his determination not upon evidence limited to that which is called "legal"; he would not be bound to give his decision at a determinate time, but he might cause inquiries to be made upon the spot by trustworthy agents, who could act on view and on testimony which they could test in every possible way; he might, moreover, adjourn the inquiry from time to time, and he would not be forced to give a decision within a limited time, but he might suspend his judgment as long as he pleased, and avoid coming to any conclusion on the point until he could come to a satisfactory one. He would so possess facilities which Courts of Justice do not possess. I think, therefore, that on the ground of verbal criticism which I have mentioned, and on this further ground of the reason of the thing, that section 57 should be held to embrace the present case. But there is a further reason, founded upon the words of the Act, which points to the same conclusion. The words of the 57th section in its concluding part are wider than the corresponding words used in sub-section 9. For the "duly fulfilled" which occur in the latter, we have the words "faithfully complied with" in the corresponding portion of section 57; a faithful compliance is there required. Now, this being so, that being the interpretation which I put upon section 57, it appears to me useless for me to go into details upon certain other portions of the case. As to the question of waiver, it has been decided already by the full Court, by the decision of which I am bound. As to the time of forfeiture, the question is not within what time forfeiture must be made, but whether that is any business of the plaintiff's, whether it is a question in which he could interfere; but the most important of all, whether he has a title to call upon the Court to declare that he is entitled to the land in question. I should be disposed to pass over the further questions altogether, but, nevertheless, as the points have been made and argued before

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me, it is necessary that I should come to a conclusion upon one of them, at all events. It has been said that the question of living, in reference to which so much has been said in this case, that the necessity for a true statement as to the living is either not a condition precedent, or that if it is a condition precedent its performance has been waived, or that it has been actually performed. Now, I shall first direct my attention to the question of the actual performance of the conditions. I should not have been anxious to go into this matter, or to say anything that might prejudice the case before any other tribunal than this, but it is probably desirable that I should do so. And, accordingly, taking the 46th section, we find it provided that the modes of selection shall be as follows:—"Any person (except as hereinafter excepted) may on any office day during office hours tender to the Commissioner or Land Agent for the district an application in the form contained in Schedule E. of this Act for selection of land." Now, the section 53 enacts that on making application there shall be required a solemn declaration to the effect contained in Schedule E.,—a solemn declaration, a declaration which could hardly be solemn unless it were truthful; a declaration which would hardly have been required by the Legislature, as a necessary accompaniment of the application, unless it were intended to be used for some purpose. Now, this declaration—solemn declaration—as we must take it to be, contains this passage, "I declare that I live in Queensland." What the meaning to be attached to "live in Queensland" is, it is for the Governor in Council to say, if I am right in my view of the operation of section 57. But conceiving that I am, perhaps, bound to give an opinion upon the subject, although I do not think this is the forum to determine what the meaning may be, I shall say enough, I think, if I say that whatever it means—whether it means domicile or anything else—it means something more than a corporeal existence within the limits of the colony. Now, it is sufficiently apparent, on looking at sections 46 and 53, that the declaration is, in a sense, to be regarded as part of the application. I am not saying that the making of the declaration and the handing in of the application must be perfectly simultaneous; that would be scarcely possible if the Land Commissioner were not a Commissioner of this Court, but I think it is necessary that they should be substantially simultaneous, and, at all events, that the statement should be taken to speak as from the time of

handing in the application. Now this application I shall presume to have been true at the time that it was made. I impute no falsehood, and desire to impute none, but simply to come to a proper judgment, a judgment of the facts as they are presented to me; but I desire to confine the presumption of the truth, if such a presumption is properly to be made, to the actual time of the making of the statement, and to the sense in which the declarant used the word "live." The statement may be true in the sense which he gave to the word "live," but may be untrue in the sense which the Queensland Legislature gave to the word "live" in the Act. The declarant may for all I know have been right when he said, "I declare that I live in Queensland." In fact, far be it from me to impute falsehood to him, or to say that he did not at the time live in Queensland in his sense of the word "live." But, I think, other difficulties apart, before I could go in favour of the plaintiff upon this part of the case, I must be satisfied that he used the word in the same sense as our Legislature, and that the declaration was true in the sense intended by our Legislature, and that it was true at the time that the application was handed in. Now, I decline to draw the inference that the declarant used the words in the sense intended by the Legislature, and I think it was for him to satisfy this Court, if he desired the Court to interpose in his favour, as to the sense in which he used the words. Again, I think it was for him to satisfy the Court as to the time at which this statement was made; for without a knowledge of that time it is impossible, or at all events difficult, to form any opinion as to whether this statement is to be regarded as true at the time the application was handed in. Now all that appears on the face of the statement is that it was made at some time in 1869, and was received on the 29th November, 1869, at 10 o'clock, from the Agent. Now, certainly, it is not shown to my satisfaction that the statement was true. It is well understood that I am not imputing personal falsehood to the plaintiff; I am speaking, not of his want of truthfulness in making the statement. In speaking of the truth of the statement, I am speaking in this way: in order that the statement should support the case for the plaintiff it is necessary that it should actually represent the facts as they existed at the time that the tender was handed in. I mean no more, and I mean nothing offensive in any way. Then, did this statement accurately represent the facts as they

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existed at the time that it was handed in? In other words, did the declarant live in Queensland at the time the tender was handed in? There is nothing on the face of the statement to show it, for "living," taking it in the narrowest sense, a corporeal presence in Queensland at some time in 1869 is quite consistent with a corresponding absence on the 29th November, 1869. Then, if there are no means of drawing inferences from the tender and statement, are there any means of drawing them from evidence in the case? I turn to the larger affidavit of the plaintiff, and in paragraph 20 I find him saying, "At the time when I made the said declaration, as aforesaid, I lived in the Colony of Queensland," by which I take him to mean, "I was present, my body was in the Colony of Queensland." In fact, such a meaning is not repudiated very strongly by his Counsel, whc, in the second branch of his argument, contended that if that was the only meaning that the plaintiff attached to living in Queensland, and even if he came up here for the purpose of obtaining this grant—if he came for an innocent purpose—the subsequent proceedings would be valid. But this statement throws no light whatever upon the time when the declaration was made, and I repeat, because this must be carefully borne in mind, the statement must speak as from, at, or near the time of the handing in of the application. Now I turn to the second, to the smaller affidavit of the plaintiff, and I find, after an allegation that he has long had properties, an allegation of his arrival in Queensland in 1868, and of his acquiring property in Queensland since that time; and "I have frequently visited and resided in Queensland, and in the other colonies." That, to my mind, does not help the matter; it gives no additional precision to the statement made in the first affidavit. In the 3rd paragraph of the smaller affidavit, he says, "On the 29th November, 1869, I had residences in each of the three colonies ready to be occupied by me." There is no statement whatever that he was in Queensland on the 29th, and unless he was in Queensland then, or thereabouts, why the statement could not be true even in the limited sense of the word that I have used. Well, then, was it true in another sense of the word, namely, that although he was absent from Queensland corporeally, yet within the fair meaning of the agreement he was present in it? Well, there is no statement whatever, I believe, of his domicile; he does not say that he was domiciled in Queensland. In fact, the only piece of

evidence that he gives—and he must know best as to the facts and circumstances—he must know best where he was at or about on the 29th November, 1869—is, "I have never been married" The only inference that I can draw from that is, that "I have no domicile, or do not care to say that I have one." Moreover, it is said that there is evidence contradicting the evidence on this point of the plaintiff, into which I do not think it necessary to go more particularly, because, if the case for the plaintiff fails from its intrinsic weakness, it is useless to go into extrinsic matters. I have gone into the second branch of the case because some consideration was in a manner forced upon me. From the aspect the case has taken it will be quite sufficient for me to rest my judgment upon the fact that this case falls within section 57 of the Act, and is not for the determination of the Court at all. But, so far as this Court would have the power to interfere, I should not be disposed to do so, because I think that the case of "living," or "residence," or whatever it may be here termed, fails. Incidentally, no doubt, I have to pronounce an opinion, so far as this second part of the case is concerned. But it is only incidentally, for if the Governor in Council is the proper authority, as I hold he is, to determine this matter, he is to say whether the truth of the statement is a condition precedent or not. But, looking at the jealous provisions of this Act for the fulfilment of the conditions—and the consequences of forfeiture will ensue from a failure to prove their faithful compliance—those are the words, "faithfully complied with," in the 57th section—I do not know whether it would be going too far to hold that it is a condition precedent. Under all the circumstances, I certainly do not feel called upon to exercise the jurisdiction of this Court, and I shall dismiss this motion for a decree with costs.

Motion for Decree dismissed.

Attorney for the Plaintiff: *Graham L. Hart.*

Attorneys for the Defendant: *Little and Browne.*

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May 30.

Judgment.

EASTER TERM.—30TH MAY, 1876.

ON APPEAL TO THE FULL COURT.

LUTWYCHE, J.:—I am of opinion that this Appeal should be dismissed, and dismissed with costs After the very lengthened arguments which have taken place at the bar, and the observations which have fallen from the Bench in the course of the trial, I think it quite unnecessary to go at any length into the various sections of the Act, and the interpretation which the 57th section ought to bear. It will be sufficient to state that in my opinion the chief objection, if not the sole objection, to the right of the Governor to deal with a claim of the kind set up by the plaintiff was disposed of by Mr. Justice Lilley, yesterday, in his remark, that the last payment of instalments would be made, if made at any time, prior to the expiration of the ten years. It seems to me that the words "Provided that he shall prove to the Governor in Council that he has faithfully complied with all the covenants and conditions contained or implied by his lease," relate not only to the case of a person who has paid his instalments regularly up to the termination of his term, but to a person who is in the position, under the certificate of the Commissioner, of compliance with the conditions, to pay up the whole balance of rent, and so become entitled to a deed of grant. But I read that word "entitled" in the 7th subsection, which is the foundation of the plaintiff's claim in this case, as giving an inchoate title, which is to be perfected and completed in the terms of the 57th section—that he has proved "to the Governor in Council that he has faithfully complied with all the covenants and conditions contained or implied by his lease under the provisions of this Act." All the other acts that are required by the statute to be performed, are, it seems to me, ministerial acts, except the act of the Commissioner in granting the certificate. He exercises a judicial discretion, but that discretion is limited to inquiring into the conditions of improvement and residence. When that certificate has been granted, or when the last payment of the instalments has been made, then arrives the time when the Governor in Council, sitting to consider the application for a grant of the land in fee, has to review the whole facts of the case; and unless it is proved to his satisfaction that there has been full compliance with the conditions, he refuses to grant the land in fee-simple. He is the proper tribunal, as it seems to me. I think we are

bound by our former decision to hold that the Governor has no power to waive any default of the selector in complying with the conditions; and if he has no power to waive that default, then it is of no consequence whether he knew or not that the conditions had not been complied with. Now I come—as it seems to me we are compelled to do—to the consideration of the interpretation which ought to be put upon the word "live," in Schedule E —"I declare that I live in Queensland." Assuming that there should be an appeal from our decision in this case, and the Privy Council should hold that we were wrong in coming to the conclusion that we have no jurisdiction to entertain this appeal, it will be necessary for them to have laid before them our opinions as to the nature of the condition which is expressed by the word "live." Now it seems to me—I do not care to mince the word —to be absurd to hold that it would be a sufficient compliance with the conditions expressed in the solemn declaration made by the plaintiff that he should be for an instant of time on the soil of Queensland, to live (that is to be alive) there.

Now, in the case of Whithom *v.* Thomas (Lutwyche's Registration Cases, vol. 1, p. 133), referred to in the course of the argument, Mr. Justice Maule said:—"Residence is not a technical term; it is a word adopted by the framers of this Act of Parliament from the popular language of the country, and is therefore to be interpreted in its popular sense." Now, the word "live" is not a technical term. As far as I know, this is the first instance in any Act of Parliament in which it has been used by the Legislature. I cannot call to mind any case where that word has been used, and no such case has been cited at the bar, and consequently none of the decisions which have been cited at the bar on one side or the other are, strictly speaking, applicable to this case. We have to put our own interpretation upon it, and, speaking for myself, I think that it excludes domicile and includes residence and something more. If you ask a man where he lives, you mean—What is your present place of abode—where is your home? It is not sufficient, it seems to me, to fulfil the conditions imposed by this Act of Parliament, that a man should reside simply in Queensland. As was pointed out during the course of the argument, a man might have three, four, five, or six residences in different countries,—that is to say, he might have so many dwelling-places where either he or members of his family might eat, drink, and sleep, and where they have a

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right to go at any time they think proper. But a "living in Queensland," I think, means something more than residing there; and I think the Legislature intended that the person who applied under the 7th subsection of section 51 should be a settler in Queensland; that he should be here for the purpose of dwelling here, of making Queensland his principal place of abode—I do not say permanent or constant place of abode—and employing the lands either personally or by his bailiff for pastoral or agricultural purposes. The whole scope of this Land Act, as it seems to me, is to promote settlement in the colony; and although there are cases pointed out where any person from the furthest ends of the earth might come and purchase lands here, still that is not the part of the Act under which the plaintiff sets up his claim. He applied as a conditional selector, and conditional selectors are required to live in Queensland. Therefore I think that this appeal should be dismissed, and with costs.

LILLEY, J.:—I have come to the same conclusion, and I need add perhaps but very little to the reasoning already delivered by my learned colleague, Mr. Justice Lutywche. I think, upon the first question, that of jurisdiction, that the certificate mentioned in subsections 6, 7, and 9 of section 51, is not a final certificate. It is a beginning of a title, or, in the language of my learned colleague, it gave an inchoate title; and I am strengthened in that view by the latter part of subsection 9, which creates a forfeiture if the lessee fails in—has not duly fulfilled—the conditions therein before specified. That is, the limited and narrowed conditions mentioned in that section, as subject to the Commissioner's certificate. But the conditions in section 51 and its subsections are not all the obligations thrown upon the lessee by the statute. In fact, some of the most important conditions, based upon the whole policy of the statute, follow that section. For instance, it is required of the lessee that he shall make this particular declaration under section 53, and I think it is required that he shall make a true declaration. I do not agree with the argument of Mr. Harding, that it might be false, and that the only consequence would be an information for perjury. It must be solemn and true, otherwise, it seems to me, that there is a flaw at the root of the lessee's title. Then there are other conditions of importance; conditions made the subject of the declaration in Schedule E, before the lessee can get his lease. The applicant shall be a person not an infant or a married woman, and must be

a natural-born or naturalized subject of Her Majesty, and a person who, in respect of the land which he applies to select, or any part thereof, is not an agent or a servant of or a trustee for any other person, and who at the time of his application has not entered into any agreement expressed or implied to permit any other person to acquire by purchase or otherwise the land for which he applies.

Now, these are all most important conditions. If the lessee were entitled absolutely under the Commissioner's certificate, under subsections 6, 7, and 9, the leasehold estate in his hands would be discharged from these important conditions. He might be trustee or agent for another, he might be an infant under the age of 21; in fact, if the certificate were final, the leasehold estate would be discharged from these conditions. We now come to see why the Governor is to come in and review the matter. The Commissioner's certificate is but to limited conditions; the Governor sees that the other conditions surrounding the leasehold title have been fully complied with before he makes the grant. He is the person to give the grant, the Commissioner only gives the certificate, and he (the Governor) has to see not only that the lessee has a certificate from the Commissioner showing the performance of these limited conditions, but that he has faithfully complied with the other conditions of the statute. That seems to me to be the obvious reason for the interference of the Governor after the certificate has been granted. If we look to section 5 of the Act we shall see that the Governor is called in upon other occasions. Very possibly this section may override the whole Act—"All questions shall be decided by the Commissioner, who shall give his decision in open court subject to confirmation by the Governor in Council."

There we have the Governor called in again to deal with the decision of the Commissioner, or in other words to review the question of performance or non-performance of conditions before giving a grant. I think that is all I need say upon that point. I agree with the interpretation of the section, "that the last payment of instalments" means the last payment of rent—the balance of the rent. The scheme of the Act is perfectly simple: the Legislature had in view the settlement of the country, and they allowed these conditional purchasers to acquire land at a fixed and low rent upon condition that they performed certain

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other obligations, viz., fencing, cultivation, or residence; all intimating the intention of the Legislature that there should be settlement. But, in order to guard the rights of the Crown, or the people of the country, they issued to them a lease defeasible only on the failure to perform these conditions. So that the Crown kept within easy control the conduct of these selectors. So long as the lease continued the money was called rent, but when a man had performed the conditions, and had made after the three years, or at the conclusion of the lease, the last payment of instalments, so soon as the final payment was made, he had acquired an inchoate right to the freehold, and it would be his if he satisfied the Governor that he had fulfilled all the other conditions required. Then, on the question of the waiver of the condition in the 53rd section, I think we must adhere to the decision of the Court, that where the statute itself gives no discretion to the Governor, but imposes an express condition or obligation, he has no power to dispense with it. He could make no waiver of a statute of the Legislature of this country requiring lands to be alienated upon certain conditions; the Legislature has not given him that discretion, and, in this instance, I must hold that he could make no waiver on his own authority. Then is it a condition that the selector must live in Queensland? I think there is only one construction to be placed upon these words: on making application under the clauses of this Act, a conditional purchaser is required to make a solemn declaration in the terms of Schedule E. It is upon the faith of that declaration, as it seems to me, that he obtains his title to the lease. He must live in Queensland, whatever that may mean, to give him the right to make the application. The declaration must be true, and the lease set out in this case shows that it was upon conditions founded upon the truth of this declaration that the land was leased to the plaintiff. There is nothing on the face of the lease to show that the Governor had determined that the declaration was true, nothing to show that it was *res judicata* All that appears on the face of the lease is that such a declaration had been made. The recital is, first, that "Mr. Fisher lately made application to us in the mode and terms required by the 46th section of the Act," pointing at once to the declaration, and simply stating that he had made an application in the mode and terms of the statute. In the second recital it is said, "Whereas such application has been considered, and the land

allotted to the said lessee." But there is nothing there to decide the truth or otherwise of the declaration. It would show rather that the land had been allotted on the consideration of that declaration having been made—on that only. The recital concludes with the words "subject to the rights, privileges, terms, conditions, provisions, exceptions, reservations, and provisoes in the said Act and hereinafter mentioned." So that the lease was granted upon the condition—as I hold—upon the faith that the declaration was true. Then the latter part of the "habendum" was pointed out by Mr. Garrick as imposing some conditions included in the statute, "or any regulations thereunder relating to selections of a like nature contained." So that the whole lease is a lease not adjudicating anything, but granting something upon the faith of another state of circumstances being true, that the declaration was a solemn and true one. I think that upon that ground I must hold that there was no waiver, and that the matter was not *res judicata* so as to create a waiver, even if the Governor had the power. Upon the third ground, which depends upon the construction of the declaration, I have thrown out certain expressions of opinion during the argument, and my brother Lutwyche has so clearly set out the opinions of the Court upon that head that I do not think it necessary to repeat them. It seems to me that it would be absurd to suppose that when the Legislature has required a man to declare solemnly that he lived in Queensland, that it meant that he was merely physically or corporeally in Queensland—that he was not dead. It is almost too absurd to hold for a moment that that could be the construction of the word "live" in this declaration. I agree with Mr. Justice Lutwyche that the word "live" means residence and something more; nothing so high as domicile—that would be too high. A man might come here for the purpose of making a fortune and make the colony his home, but without any intention of changing his former domicile. He would do more than simply reside, to reside would be included in the term "live." "Live" means, I think, "I have my home here—permanent home"—although, of course, not a necessity never to leave it for a certain time.

For these reasons, I agree with my colleague, Mr. Justice Lutwyche, and with the Judge below, in the conclusion he came to. I may state that I find for myself as a matter of fact that Mr. Fisher did not live within the Colony of Queensland, within

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the Act. I think he must live in the colony under section 53 at the time of making the application; his home must be here. Now, he has sworn—in fact, it seems to me that he has carefully avoided—I do not think I use too strong an expression—I think, upon looking at his affidavits, that he has carefully avoided saying that he lived in Queensland *at the time he made the application.* He has simply said *at the time he made the declaration* that he was living in the Colony of Queensland. But that is not sufficient under the statute; so I think I must find that he has failed to make out his case, which it is necessary for him to do to entitle him to a grant, if the Court is the proper tribunal and not the Governor.

COCKLE, C.J.:—I agree with the judgments delivered by my learned brothers.

Appeal dismissed with costs.

Solicitor for the Appellant: *Graham L. Hart.*

Solicitors for the Respondent: *Little and Browne.*

C. Q. M. P. Co. (LIMITED.) v BURY AND ANOTHER. Statement.

THE CENTRAL QUEENSLAND MEAT PRESERVING COMPANY (LIMITED) *v.* BURY AND ANOTHER.

Company—Winding-up Order of Extraneous Court—Execution levied upon Realty.

A Plaintiff, in a cause tried in the Supreme Court of Queensland, having obtained a judgment against a Limited Company, registered in England, took out a writ of *fi. fa.* and proceded to levy upon lands of the Defendant Company in Queensland. Shortly before the levy, an Order for winding up the Company was made by the Court of Chancery in England.

Held that the Court would not restrain the judgment creditor from proceeding under the writ.

DEMURRER.

THE Plaintiffs' Bill stated that they were a Joint Stock Company, registered in England, under the provisions of *The English Companies Acts* 1862 *and* 1867, for the purpose of purchasing sheep and cattle, and preparing and preserving meat and tallow, in the Colony of Queensland and other colonies or possessions of Great Britain in Australia and New Zealand, and the exportation of the same for sale in England and elsewhere. The registered office of the Company was in London, in England, and it had an agent in Queensland, through whom it transacted its business there. The Company was possessed of certain lands in Queensland, and, also, of the beneficial interest in certain other lands in Queensland.

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Statement.

On the 30th April, 1874, the Defendants obtained a judgment against the Plaintiff Company in the Supreme Court of Queensland for £429 12s. 6d., and on the same day sued out a writ of *fi. fa.* upon the judgment against the Plaintiff Company. The writ was delivered to the Sheriff upon the 1st of May, 1874. The cause of action in respect of which the writ was issued was a claim by the Defendants as payees of two several dishonoured bills of exchange accepted by the Plaintiffs. At the time when the Defendants became holders of the bills, they had notice of the incorporation of the Plaintiff Company, and of the contents of its memorandum and articles of association, and of *The English Companies Acts* 1862 *and* 1867.

By an Order of the High Court of Chancery in England, dated the 2nd of May, 1874, it was ordered that the Plaintiff Company should be wound-up under the provisions of *The English Companies Acts* 1862 *and* 1867, and by an Order of the Master of the Rolls, dated the 7th of May, 1874, an official liquidator of the Company was appointed.

The sum of £214 19s. was realized by the Sheriff upon goods and chattels of the Plaintiffs in Queensland under the writ of *fi. fa.* on the 27th of June, 1874. The Sheriff caused notice of the writ, and that the lands in which the Plaintiffs were possessed of the beneficial interest only would be sold on the 1st day of August, 1874, and on the 18th of July, 1874, the Sheriff caused notice that the lands in which the Plaintiffs were possessed of both the legal and beneficial interest would be sold on the 31st of August, 1874.

The Plaintiffs prayed that the Defendants might be restrained from further proceedings under the judgment by selling or disposing of all or any part of the lands.

The Defendants demurred for want of equity.

Blake, Q.C., and *Beor* for the demurrer.

The Attorney-General (S. W. Griffith) and *Harding* for the Plaintiffs.

Judgment.

COCKLE, C.J.:—I have turned, amongst other cases, to *ex parte* Scinde Railway Company, and to Ellis *v.* McHenry, cited at the bar, and, also, to Bartley *v.* Hodges (1 Best and Smith, 375 and 30 L.J., Q.B. 352) and to Edwards *v.* Ronald (1 Knapp, 259), which are both cited in Ellis *v.* McHenry. The case of Edwards *v.* Ronald was heard before the Privy Council. In

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delivering judgment the Lord Chancellor did not lay down any general rule, but simply said, "I have read and considered the papers in the above case, and am of opinion that the judgment of the Court in India ought to be reversed. I think the certificate was, in this case, a sufficient bar." But none of these cases touch the present, which relates to realty in Queensland. The case of Cockerill *v.* Dickens (3 Moore 98) was also heard before the Privy Council. Now, I shall follow the analogies of that case (*ibid.* p. 132). Moreover, there is not any law or custom, or any usage of comity or statute, to justify me in preferring a foreign, or say extraneous, company or official liquidator to a Queensland creditor who has gone against the realty. No Imperial Act extended to the colonies, or explicitly or implicitly adopted therein, and no Queensland Act, or New South Wales Act in force in Queensland requires me so to do. Were I to do so, I must have recourse to some principle of which, depending neither on municipal law, usually so called, or on international law, it might be difficult, for me at least, to present a clear view. I do not feel called upon to make a precedent of doubtful expediency, and I allow the demurrer.

Costs of injunction allowed to Defendants.

Attorneys for the Plaintiffs: *Macalister and Mein.*

Attorney for the Defendants: *Graham L. Hart.*

N. C. M. Co. (LIMITED). Nov. 20. Statement.

RE THE NORMANBY COPPER MINING COMPANY (LIMITED).

Company—Winding up—Contributories—27 Vict. No. 4, Secs. 3, 10, 13, 24, 37.

Bonâ fide purchasers for value of shares represented by the Company to be paid up in full and registered as such are not liable to be on the list of contributories in respect of them unless they knew that the shares had not been fully paid up (*vide* Waterhouse *v.* Jamieson, L.R. 2, Sc. App. 29).

The Attorney-General (S. W. Griffith, Q.C.) and *Pope Cooper* appeared in support of the list of contributories made out by the Official Liquidator in the winding-up the Normanby Copper Mining Co., Limited.

Harding, *Garrick*, and *Real* appeared for different persons whose names were included in the list.

THE following cases were cited in the argument:—

West Cornwall Ry. *v.* Mowall, 12 Jur., 407.

Hoole *v.* Gt. West. Ry. Co., L.R., 3 Ch., 262.

Crawley's case, L.R., 4 Ch., 322.
Wood's claim, 9 W.R., 366.
Daniels' case, 1 De G. and J., 26 L.J., Ch. 563.
Coates' case, L.R. 17, Eq. 164.
Fothergill's case, L.R. 8, Ch. 270.
Spargoe's case, L.R. 8, Ch. 407.
Dent's case, L.R. 8, Ch. 768.
Duke's case, L.R. 1, Ch. Div., 620.
Saunders' case, 2 De G., J. and S., 110.
Nickoll's case, 24 Beav., 639.
Nathan's case, L.R. 3, Eq. 77.
Ship's case, 13 W.R., 450.
Emmerson's case, L.R. 2, Eq. 231, on App., 1 Ch., 433.
Lowe's case, L.R. 9, Eq. 589.
Leifchild's case, L.R. 1, Eq. 231.
Baron de Ville's case, L.R. 7, Eq. 11.
Carling's case, L.R. 1, Ch. D. 115.
Currie's case, 3 De G., J. and S., 367.
Ferrar's case, L.R. 9 Ch., 355.
Pellatt's case, L.R. 2, Ch. 527,
Slace and Worth's case, L.R. 4, Ch. 682.
Burns' case, L.R. 9, Ch. 102.
Waterhouse *v.* Jamieson, L.R. 2, Sc. App. 29.

Judgment.

LILLEY, J.:—In this case the Official Liquidator has made out, in compliance with the rules, a list of contributories, which he has verified, and *prima facie* as far as the persons on that list, who have had notice, have not discharged themselves, they would be liable to be retained as contributories. The Official Liquidator has, in some instances, very properly entered into details to show in what way he assumes the liability of certain shareholders has arisen. The first whom he seeks to put on the list is Mr. William Southerden, in respect of shares for which he subscribed the memorandum of association as unpaid shares. The law has been already decided, not only in this Court, but in numerous cases in England, that a person who subscribes the memorandum undertakes the liability appearing on that document as a specialty debt, and Mr. Southerden's name appears there, as I had stated, for one hundred (100) unpaid shares. He has made an affidavit, in one paragraph of which—I think the 4th—he says that he is neither a promoter nor a proprietor, and he enters into a long statement about other shares which he purchased in the market,

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but he in no way deals with the 100 shares for which he subscribed the memorandum. I assume, of course, that he is the William Southerden whose name appears on the memorandum, and as the person who is on that memorandum has not discharged himself, he will be placed on the list in respect of 100 shares.

The next set of contributories, or alleged contributories, is contained in Schedule F to the Official Liquidator's affidavit. The liability, it seems to me, of any person who is sought to be made a contributory must be established by contract, either express or implied. The statute, I think, shows that very clearly, and there is nothing that I can discover in the reported cases which at all militates against that; but rather, I think, there are principles enunciated by the judges in those authorities which support that proposition. The ordinary rules applicable to common partnerships are excluded by, I think, the 3rd section of the statute. Whatever partnership, in the nature of a joint-stock company, is formed, containing over a certain number of members, must be formed in pursuance of the statute. Now, the 10th section of the Act gives the memorandum of association, in respect of its contents, the force of a specialty. Whatever appears to be unpaid on the face of that instrument is a specialty debt; in like manner the 13th section makes the liability, which appears by the articles to be unsatisfied, to be a specialty obligation. There is another important, though not conclusive instrument provided for by the Act, which is called the articles of association. Section 24, in its 1st subsection, describes the essentials of that instrument. It is to contain the names, addresses, and occupations of the members, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number, and the amount paid, *or agreed to be considered as paid*, on the shares of each member. Then by section 37 of the Act, in its 4th subsection, there is a power to limit the liability, which would be otherwise unlimited under the section —"in the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." In the memorandum of association in this case, the shares all appear as unpaid, but in the articles, in section 2, there are 60,000 shares described as fully paid up, with the names of the persons to whom they are allotted, some

of these persons being directors, others promoters—probably all of them promoters. The register contains the names of all the persons in Schedule F as fully paid up shareholders. Well, now, I have reached certain conclusions of law from the statute, and the instruments which I have described, the statutory evidence of the agreement or contract between the parties. First, it appears to me to be very clear that there is a power to create shares fully paid up, or to agree that they shall be considered as fully paid up. But, I think, that power must appear on the memorandum or articles of association, and I think it appears clearly here, that not only such a power was taken at the foundation of the company, but that it was actually exercised by the allotment of a large number of fully paid up shares. Section 37 thus limits, in my opinion, the liability with reference to the articles of association and the register. There is no other way that I can see of limiting the liability. Certainly a colourable or fraudulent sale at a discount would in no way limit the liability of parties in the face of these instruments, that is, the articles and register, particularly the articles, if inconsistent with such a sale.

Well, then, I think that by buying with the knowledge that the shares were unpaid, an original allottee from the company, as a general rule, unless statutory documents treated his shares as fully paid up, could not limit his liability, because the articles make unpaid amounts specialty debts, and section 37 determines the extent of the liability and the possibility of a limitation. If, therefore, the allottee had knowledge that the shares were unpaid, an entry of them on the register or scrip, as fully paid up shares, would be a mere fraudulent misdescription to avoid liability; unless he knew that they were not to be treated as unpaid shares, as the very basis of the company. Now, in this case, it seems to me there was neither knowledge that the shares were unpaid, nor was there acquiescence with knowledge, nor representation to creditors on the register that these shares were unpaid, so as to raise either an express or implied contract. I think I may take it that all the shareholders are in a like case with Mr. Robert Little, who has filed an affidavit in the matter. There was, it seems to me, not only a contract for fully paid up shares, but an actual representation to the shareholders by the directors, who had been promoters of the company, that the shares were fully paid up. There was no knowledge whatever

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that these shares were unpaid, so far as I can discover from the evidence. Mr. Little's affidavit, I think in paragraph two, says that "the said shares were purchased by me on or about the first day of May 1873, on the representation of two of the directors of the said company, to wit Henry Palmer and William Southerden, as expressed in the scrip issued to me therefor, numbered respectively 938, 939, and 940, and that the said shares were paid up shares"; and he annexes the scrip, which describes them as fully paid up shares. Now, there was nothing on the face of the articles of association, in the shape of numbers or description, which could undeceive any one of these shareholders. The shares were in no way ear-marked. Here was a company with power to issue fully paid up shares, no description of them in the articles, the sale of these shares by the directors, and an entry on the register by them, and the description in their scrip that these shares were fully paid up. Well, if these shareholders had even looked at the prospectus of the company, they would have found no information at all likely to undeceive them, but rather information that would tend to confirm the idea that the directors were dealing, and had authority to deal, with fully paid up shares. The company was originally launched with a prospectus which describes it "as a company having a nominal capital" —there is no weight in the argument as to the word nominal— "of 80,000 shares of £1 each, of which 40,000 fully paid up shares will be retained by the present proprietors, 20,000 will be reserved for future allotment, if necessary, and 20,000 fully paid up promoters' shares are now offered to the public at 5s. each." So that, as I have said, the idea that the directors were dealing honestly with fully paid up shares would be strengthened by that document, if they ever saw it, which I have no reason to believe they did. Well, they were registered as fully paid up shareholders, and the creditors dealt with them as such. I must assume that, because it would not appear that they dealt in any other way. They all paid at least 5s., which was the reserved sum on the promoters' paid up shares, and it seems to me that they had no knowledge that they were dealing with any other than fully paid up shares. Under these circumstances, I think it follows from the conclusion of law that I have drawn, that as they are in fact unpaid shares, they have no claim on the company as fully paid up shareholders, and as the shares were not fully paid up, and they cannot be called upon to pay the full

amount, they must be struck off. Therefore all the persons named in Schedule F will be struck off the list of contributories. In other words, I cannot substitute a contract of my own, or of the Official Liquidator's, for the contract which they made under the statute—and in fact. Then the facts as to the contributories, or alleged contributories, in Schedule G are the same with reference to all except Mr. John Fraser; and therefore I must deal with his case as the one upon which the Attorney-General, for the Official Liquidator, relied most strongly, as entitling him (the Official Liquidator) to fix his liability as a contributor. With regard to all the others, except Mr. Fraser, the case does not go further than it does against the shareholders in Schedule F. Then with regard to Mr. Fraser: he was a director of the company; but he was a director in Sydney, and it is sought to impute knowledge to him; because the Official Liquidator's affidavit certainly is insufficient to attach actual knowledge. It seems to me that there is not sufficient evidence of knowledge on the part of Mr. Fraser. As far as I can gather from the evidence, the whole affairs of the company seem to have been managed in this colony, and the 10,000 shares, a part of which he purchased from a broker in Sydney, were sent down to be disposed of there by virtue of a resolution passed by the directors in this colony. And the Official Liquidator, who might, I think, have given us better evidence upon this point than he has done, says that the resolution, or the purport of it, was conveyed to the directors in Sydney. Now, surely there must have been a letter-book in connection with this company, and the despatch of so important a resolution as that would surely appear in the letter-book; and if he had attached a copy of that letter to his evidence, we might have been in a position to know that the resolution, as it stands in the books of the company in this colony, was actually conveyed to the directors in Sydney. But then there would have been a further question, even if the directors in Sydney had notice of the resolution, "Was Fraser ever present at a meeting when that resolution was discussed, or did it ever reach his hand?" I cannot impute knowledge to him—I cannot fix him with such a breach of trust as would render him liable as an unpaid shareholder under this statute. There must be clear evidence to bring him under the rule of knowledge, namely, that he made a contract for unpaid shares, or took the shares, colourably and fraudulently, that they might be entered on the register

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as fully paid up shares, when, in fact, he knew they were unpaid shares. I do not find that knowledge here, and upon that question the evidence of the Official Liquidator is exceedingly loose indeed. As to the knowledge, he says, "By a resolution of the directors of the said company, passed on the 23rd December, 1872, it was resolved that in order to raise funds, that 5,000 reserved shares be allotted to the Chairman in trust, and that the scrip for the 5,000 shares be sent to the said Sydney directors for them to place in the hands of some responsible broker for immediate sale at not less than 10s. per share nett." Now, if Fraser had ever seen or referred to the prospectus, he might have seen that there were reserved shares mentioned there: "20,000 will be reserved for future allotment." That might have given him an inkling that they were dealing with unpaid shares. Now, if the word "reserved" were left out of the copy of the resolution sent to Sydney, or out of its purport, he might be under the impression that the directors were dealing with shares which they were entitled to regard as fully paid up shares, and that they were not exceeding their duty. Altogether, the evidence is very loose on that question of knowledge, and it is a most important element in the case as against Mr. Fraser. The 15th paragraph of the Official Liquidator's affidavit seeks to fix the other shareholders in Schedule G. with knowledge in this way, "I verily believe that all the other persons in the said schedule mentioned were fully aware when they purchased the said shares that they were, in fact, purchasing them from the said company, and that no money had been paid up in respect thereof other than the money paid by them as purchasers." There is nothing there to affect the case. As I have laid down the principle upon which it is to be decided, they might be aware that no money had been paid, and they might be aware that they were purchasing the shares from the company, and they might be aware that they were to be original allottees; but there is nothing to show that they had knowledge that they were in fact purchasing shares that were unpaid, and that the company had no authority to deal with them as fully paid up shares. I think, therefore, that if any remedy is to be sought against Fraser, he must be affected under section 166 with his co-directors for a misfeasance or breach of trust, if there be any evidence to affect him in that way. I will, also, strike off those in this schedule including Mr. Fraser.

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Then the last question that remains is the one of costs. Now, I have looked over the list of names of persons who are asking for costs, and I find that, in almost every separate group, one of the promoters of the company is included. The company seems to have taken power largely to deal with fictitious capital, and to have used it freely; and none of the persons who, either by want of caution, or by in any way getting themselves included on the list of fully paid up shareholders, seem to be entitled to sympathy, to take the form of costs more especially, as it is probable that those costs will have to be levied in the way of calls from persons who had been innocent purchasers of unpaid shares. I, therefore, give no costs. The Official Liquidator's costs will be allowed out of the estate.

Attorneys for the Official Liquidator: *Hart and Flower.*

Attorneys for the Contributories: *W. E. Murphy* and *Lyons and Chambers.*

CASES

DETERMINED BY

THE SUPREME COURT

IN

HILARY TERM, 39 VICTORIA.

COMMON LAW.

TOOTH *v.* SPIRO AND OTHERS.

COM. LAW. 1876. TOOTH v. SPIRO AND OTHERS. *March* 7. Statement.

Justices of the Peace—Petty Sessions—Jurisdiction—Recovery of Wages—Prohibition—Practice—14 *Vict.* 43, *sec.* 12, 1 *Vict.* 39, *sec.* 5, 25 *Vict.* 11, *sec.* 9.

A servant who had performed service at C. made complaint, before Justices of the Peace sitting in Petty Sessions at T., distant 45 miles from C., that wages were due to him for such service. There is a Court of Petty Sessions held at A., which is distant 11 miles from C.

Held that section 9 of 25 Victoria, No. 11, makes it necessary that complaint should be made to the nearest Court of Petty Sessions, and that the justices sitting at Toowoomba had no jurisdiction to determine upon the claim.

Held, also, that section 12 of 14 Victoria, No. 43, applies to cases where justices have acted without jurisdiction, and that, therefore, a Judge in Chambers has power to hear and determine applications for writs of prohibition in such cases.

RULE directed to the Defendants calling upon them to show cause why a writ of prohibition should not issue to restrain them from further proceedings in respect of an order made by some of them, Justices of the Peace at Toowoomba.

The Defendant Spiro made a complaint before the other Defendants, sitting in Petty Sessions at Toowoomba, that wages were due to him from the Plaintiff for service rendered at Clifton. The Plaintiff did not appear and an order was made upon him by the Defendant Justices directing him to pay the amount claimed by Spiro with costs. The above rule was afterwards obtained in Chambers upon an affidavit stating that the cause of action arose at Clifton, that Toowoomba was 45 miles distant from Clifton, and that a Court of Petty Sessions was held at Allora, which was only 11 miles from Clifton, and upon the

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ground that, the Court of Petty Sessions at Allora being nearer to Clifton than the Court of Petty Sessions at Toowoomba, the Justices in Petty Sessions at Toowoomba had no jurisdiction to determine upon the complainant's claim.

March 7.

The rule was made returnable in Chambers, but the Judge in Chambers, being in doubt whether he had power to make the rule absolute, referred the question for the decision of the full Court.

Statement.

The Attorney-General (S. W. Griffith) showed cause.

Blake, Q.C., in support of the rule.

Judgment.

COCKLE, C.J. :—The 12th section of the 14 Vic., No. 43, gives any person aggrieved by a summary conviction the privilege of applying for a prohibition, and it may be that when a prohibition for want of jurisdiction is sought under this section, the onus of proof may be changed, and that the aggrieved party may have to show positively the want of jurisdiction. But there seems to be no great expediency for excluding from the operation of this section cases in which there has been an actual want of jurisdiction, for a person may be as much aggrieved by the act of a justice who acted without jurisdiction, as by the irregular acts of justices who are acting within their jurisdiction, and then, if that be so, and if it be not absolutely necessary to have recourse to a Common Law prohibition when there is a want of jurisdiction, then under the 5th section of 17 Vic., No. 39, the Judge at Chambers would have power to hear and determine the matter in this rule *nisi* or order. Then, as to the other point, there may be some obscurities in the wording of the statute, and the matter may not be altogether easy of determination, but still, I think, the meaning is sufficiently clear to enable one to come to the conclusion that, in the present case, there was a want of jurisdiction. In the 9th section the Legislature provided for a merely preliminary matter, probably something more in the nature of a ministerial than a judicial act, and is very careful to say that that preliminary act shall only be performed by the Justices "where or near to the place where the service shall have been performed or where or near to the place where the person or either of the persons upon whom the claim is made shall be or reside." And, therefore, it is probable that the Legislature used equal circumspection in limiting the class of justices by whom the final act, to which this was merely pre-

liminary, should be performed. Now, there is great weight in much that the Attorney-General has urged as to the interpretation of this clause; but it may be, however, on the other hand, that the word district was introduced, that the matter should not be confined to the justices near to the place mentioned in section 9, and so restrict the return of the summons to justices of the same jurisdiction as that of the justice who issued the summons, and secondly, to avoid that difficulty and to show that it was to be the nearest Court of Petty Sessions to which the summons was to be made returnable. It uses the word "district," thereby saying, that we do not confine you to the jurisdiction of the summary justices. It seems that the word justice or justices in Petty Sessions shall mean any Police Magistrate, or any two or more Justices of the Peace assembled and acting in Petty Sessions and in open Court in the district or place nearest to the district or place where the matter requiring the cognizance of such justices arises, or where the master and the servant are residing or sojourning when the complaint is made. I think it points to the nearest Bench.

LUTWYCHE, J.:—I am of the same opinion. Whatever difficulty there is in the interpretation of the Act, and I admit there is some, is introduced by the interpretation clause itself. But I think the better construction is that put upon it by the Chief Justice; the Court is the nearest Court of Petty Sessions.

LILLEY, J.:—I think the summons must be returnable at the Court of Petty Sessions nearest to the district or place where the matter requiring the cognizance of such justice arose, or where the master and the servant are residing when the complaint is made. Now, in this case, the master and the servant were not residing at the same place—in fact, they were 41 miles apart; therefore it is a different question here, and that portion of the enactment is out of place. The cause of action, or the matter requiring the cognizance of the Justices, arose at Clifton, within 12 miles of Allora, which was the nearest Court of Petty Sessions. It seems to me that it was to that Court the complainant should have gone. Having gone to Toowoomba, she was out of the jurisdiction, and the Justices had no power to act. The order for a prohibition must be made absolute.

Rule absolute.

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Attorney for the Plaintiff: *Thynne*, agent for *Hamilton and Son*, Toowoomba.

Attorneys for the Defendants: *Daly and Abbott*, agents for *Dodd*, Toowoomba.

GODFREY v. BAILEY.

GODFREY v. BAILEY.

Mar. 7 & 8.

Costs—Certificate for Costs—31 Vict. 20, Secs. 5-12.

A Plaintiff who recovers a sum not exceeding £30 in the Supreme Court is not entitled to Costs unless he obtains a Certificate from the Judge under the provisions of the Act 31 Vict. 20, sec. 12.

Statement.

APPEAL from the Northern Supreme Court.

The Appellant obtained a verdict for £30 in an action for libel tried in the Northern Supreme Court held at Bowen on the 25th and 26th days of August, 1875. No certificate for costs was obtained from the learned Judge at the trial. The Master of the Northern Supreme Court, upon being applied to to tax the plaintiff's costs, refused to do so, on the ground that the Judge had granted no certificate. An application was then made to the learned Judge of the Northern Supreme Court for an order to direct the Master to tax the costs, and an order was made dismissing the application. The Appellant afterwards applied in Chambers at Brisbane for an order calling upon the Defendant to show cause why the above order should not be rescinded and an order made directing the Master to tax the Appellant's costs of the trial, which order was granted.

The Appellant in person moved to make the order absolute.

The Attorney-General (*S. W. Griffith*) showed cause, and cited the following cases:—Ebbs *v.* Boulnois, L.R. 10, Ch. 479; Strachey *v.* Lord Osborne, L.R. 10, C.P. 92; and referred to the following Statutes, *C.L.P. Act*, 1853, sec. 173; *District Court Act*, 1869 (22 Vict., No. 18), sec. 101.

Judgment.

COCKLE, C.J.:—It is possible that if there had been any other element introduced into the case, that I should have come to the conclusion that the clauses from the 6th to the 11th inclusive were so many qualifications or limitations of the 5th section; but, at the same time, such a conclusion, even if possibly right, would be liable to the remark that, while it reconciled an apparent conflict of clauses, nevertheless, a similar reconciliation would have been effected by taking the Legislature to have meant in the 11th clause, any other action. But there are sufficient reasons for excluding the interpolation of that reading, on the grounds that there are no other actions to which the

statute can apply. Then, that being so, the law of Queensland seems to be, that a plaintiff who recovers a sum not exceeding £30 has no claim whatever to costs unless he obtains the certificate of the Judge under the 12th section. Having got that certificate he acquires no absolute title to costs, but only such a title as he might have under the combined operation of clauses 5 to 10 of *The Costs Act*.

Consequently, I think, we can make no order on the Northern Registrar to tax the Plaintiff's costs.

LUTWYCHE, J.:—I am of the same opinion, and I think it unnecessary to add anything further to what has been already said.

LILLEY, J.:—The question raised by the Plaintiff in this case was decided some time ago by the learned Chief Justice in a carefully considered judgment—I allude to the case of Avery *v.* Woods. There is no doubt from the peculiar collocation of the sections in this *Costs Act* that the question raised by the Plaintiff is not, at first sight, free from difficulties; it requires a very careful examination of the Act before we can come to a conclusion between the different possible readings of the sections. Because, in whichever way we read them, if we read them in accordance with the view of the learned Northern Judge, we must insert in the 5th section the words "except as hereinafter mentioned," or if we were to read them in accordance with the view of the Plaintiff we must insert in the 11th section, "in any other action in the Supreme Court"; in either view we should have to resort to legislation. There has been a great deal of perplexity, too, felt by the profession as to the meaning of these sections, so that it is as well that the matter has been raised for the decision of the Court. Now, I have come to the same conclusion—though, perhaps, with some greater degree of hesitation—as the other members of the Court, namely, that without the certificate of the Northern Judge the Plaintiff in this case is not entitled to his costs, and that if he had had that certificate he would only have been entitled to such costs as are given by the 5th, 6th, 7th, and some other sections of the Act applying to those particular kinds of action. But one conclusive argument, it seems to me, against the Plaintiff's claim to read section 11 as applying to any other action—that is, his claim to insert the word "other," or "action of contract," as he calls it (although there is really no such action), the one conclusive argument against it is, that, beginning with the 6th section and

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ending with the 10th, all forms of action at present known to the law are specifically mentioned. Section 6 relates to personal actions, section 7 to trespass on the case, section 9 to alleged wrongs, and section 10 to actions on the case for slanderous words—all personal actions. And, in fact, in the present day, the only actions known are personal actions. All real actions were abolished by the 3 and 4 William 4—the *Real Property Act* of that day. Although the action of ejectment seems to have been recognized by the Legislature as a real action, it would seem to have been under some misapprehension, because it was undoubtedly a personal action for the recovery of damages, for the ouster of the Defendant from the possession of the land, and in no way an action for the recovery of the realty; so that it was then a personal action in its nature, and it has been still more marked by our statutes as a personal action. Then the writ of dower and the writ of right of dower have both been made personal actions by a statute of our own, *The Common Law Practice Act of* 1867. By section 4, "No writ of right of dower or writ of dower and no plaint for free bench or dower in the nature of any such writ or action and no *quare impedit* and no action real or mixed except an ejectment shall be brought after the commencement of this Act in any Court whatsoever but when any such writ action or plaint would lie now in the Supreme Court an action may be commenced by writ of summons issuing out of the said Court in the same manner and form as the writ of summons in an ordinary action"; so that there is no action, real or mixed, in the Court. Then there are the words, "except the action of ejectment;" I have already shown that the action of ejectment is, in fact, a personal action.

Then, *The Costs Act* cannot relate to ejectment, for this additional reason—no damages, or money, are recoverable now, the writ is only for the possession of the land, so that this *Costs Act* cannot relate to that; and section 11 cannot relate to ejectment, and in all the preceding sections referred to, all actions are included; so that, when the Plaintiff recovers not exceeding £30 he is not entitled to recover costs unless the Judge certifies for them. Then, if the Judge certifies in his favour, he is only entitled to such costs as may be given to him under the sections from 6 to 11 inclusive.

Appeal dismissed with costs.

Attorneys for the Respondent, *Macalister and Mein.*

BARRY *v.* SKUTHORPE.

March 9.

Agreement—Wrongful Dismissal—Absence of obligation to perform promise—Condition precedent.

The Plaintiff and the Defendant entered into a written agreement by which the Plaintiff undertook to point out to the Defendant certain land open to be applied for under *The Pastoral Leases Act of* 1869, and the Defendant promised to pay the Plaintiff £700 in the event of the Defendant approving or occupying the land. The plaintiff proceeded to the land, and incurred trouble and expense in making preparations which were necessary before pointing out the land. To an action by the Plaintiff against the Defendant for wrongfully discharging the Plaintiff from the performance of the agreement, the Defendant pleaded that he did not approve or occupy the land.

Held, that the plea was a good plea.

Statement.

DECLARATION—3rd count—That it was agreed by and between the Plaintiff and the Defendant that the Plaintiff should point out to the Defendant a certain block of country in the Colony of Queensland, then open to be applied for under *The Pastoral Leases Act of* 1869, * * * and that in the event of the Defendant approving of or occupying the said country, the Defendant should pay to the Plaintiff the sum of £700, and the Plaintiff accordingly proceeded with the Defendant in the direction of the said block of country for the purpose of pointing out the same to him, and the Plaintiff was always ready and willing to point out the said block of country to the Defendant, and to perform the said agreement on his part, and incurred great trouble and expense in preparing to perform the said agreement on his part and all conditions, &c. * * * * Yet the Defendant refused to permit the Plaintiff to point out the said block of country to him, or to perform the said agreement, and prevented and wrongfully discharged him from so doing, by reason whereof the Plaintiff lost the time, trouble, and moneys expended by him in endeavouring to perform the said agreement, and the Defendant refused to pay the Plaintiff the said sum of £700 or any other sum in respect of the premises.

Pleas, *inter alia*, 3, that the Defendant did not approve of or occupy the said block of country in accordance with the terms in that behalf contained in the said agreement.

Demurrer and joinder.

The Attorney-General (*S. W. Griffith, Beor* with him), in support of the demurrer, cited the following cases:—Inchbald

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v. The Western Neilgherry Coffee Co., 34 L.J., C.P. 15; De Bernardy *v.* Harding, 8, Ex. 822; Frost *v.* Knight, L.R. 7, Ex. 111; Stirling *v.* Maitland, 5 B. and S., 840.

Blake, Q.C. (*Power* with him) contra.

COCKLE, C.J.:—If this had been a declaration for £700, the plea would have been undoubtedly good; but we will treat it as a count in which only nominal charges are sought for the breach of an agreement. Now, as applied to this case, I apprehend that the dictum cited from page 852 of 5 Best and Smith, should be read thus:—"If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances liable to be enforced under the agreement." But I do not understand the decision of the Court in that case to go to this extent, namely, that a promise capable of forming the basis of an assumpsit not to prevent the performance of a condition precedent is to be inferred in every agreement. If so, I think contracting parties would be liable to all manner of implied assumpsits which they never contemplated. Now, in this case, the 3rd count avers, by way of breach, "that the Defendant refused to permit the Plaintiff to point out all the said block of country to him, or to perform the said agreement." That, in effect, is an allegation that the Defendant prevented the performance of a condition precedent; and what is the result? That the Plaintiff, for the purposes of this action, stands in the same position as if the condition precedent had been performed, and is entitled to all that he would have been entitled to had that condition precedent been performed. But to what is he entitled? I conceive not even to nominal damages, unless the Defendant approved of and occupied the country—or approved of it at all events. That being so, and the plea showing that the Defendant did not approve of or occupy the country, I think the case for the Plaintiff fails, and that the plea is a good plea. There must, therefore, be judgment for the Defendant.

LUTWYCHE, J.:—The Plaintiff complains, in the 3rd count of his declaration, of being deprived by the Defendant of an opportunity of pointing out a certain block of country, pursuant to an agreement between them. Now, the Defendant in his plea, which is demurred to, says that the agreement made between

the parties is the same as that set out in the first, second, and third counts of the declaration, and as the demurrer admits the facts stated in the plea, we must look at the agreement; and the agreement is, that in the event of the Plaintiff pointing out the block of country, and the approval or occupation of the country by the Defendant, the Plaintiff shall become entitled to the sum of £700. Well, that is a double event, and the Plaintiff having complained that he was prevented from accomplishing the first, is in the same situation as if it had been fulfilled. But the second event did not occur. The plea says that the defendant neither approved of nor occupied the land, and, consequently, the Plaintiff had no right of action whatever. And that is a good plea in bar.

LILLEY, J.:—I am of the same opinion. I think there must be judgment for the Defendant on the demurrer. It seems to me all the cases cited by the Plaintiff support the judgment. In those cases, there was on the non-performance of a condition precedent an absolute obligation arising on the part of the defendant to perform his share. But here there is no such absolute obligation—a mere option.

Judgment for the Defendant.

Attorney for the Plaintiff: *A. J. Thynne.*

Attorney for the Defendant: *Murphy*, agent for *Abbott*, Roma.

KIRK *v.* THE COMMISSIONER FOR RAILWAYS.

Railway—Common carrier—Negligence—Gross negligence.

If a jury in their verdict draw a distinction between negligence and gross negligence the Court will recognize the distinction.

A stipulation by a common carrier as a condition of his carrying goods, to the effect that he will not be responsible except for the gross and wilful default of his clerks, officers, servants, or agents, is a reasonable and valid condition.

DECLARATION for negligence in the carriage of certain cattle whereby they were burnt and destroyed.

Fourth plea, that the cattle were delivered to the Defendant to be carried on the terms that the Defendant should not be responsible except for the gross and wilful default of his clerks, officers, servants, or agents, and that the injuries complained of were not caused by such gross and wilful default.—Issue.

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At the trial before Lilley, J., at the Brisbane Supreme Court *Nisi Prius* Sittings, February, 1876, it was proved that the cattle were delivered to the servants of the Defendant to be carried by railway from Oxley West to Dalby. At the time of delivery a consignment note for the cattle was signed by the Plaintiff's agent, which stated that the goods were carried subject to the conditions printed on the back. One of the conditions on the back of the note provided that the Defendant should not be responsible for any loss or damage to goods carried unless such loss or damage should arise in consequence of the gross or wilful default of the Defendant's clerks, officers, servants, or agents. The cattle were placed in some trucks, on the bottom of which some straw was put, and which were attached to a train which afterwards proceeded towards Dalby. On the way to Dalby the straw in the trucks was set on fire by some sparks from the engine, and the cattle were so seriously burnt that they died.

The learned Judge left the following questions to the jury:—1st—Were the conditions part of the contract? 2nd—Was there gross and wilful default on the part of the Defendant? 3rd—Was there negligence on the part of the Defendant? 4th—Was there contributory negligence on the part of the Plaintiff?

The jury answered the first and third questions in the affirmative, and the second and fourth in the negative, and gave a verdict for the Plaintiff generally with damages £377 1s. 8d.

The Attorney-General (*S. W. Griffith*) obtained a rule *nisi* to enter a verdict for the Defendant on the ground that the finding of the jury on the first and second questions entitled the Defendant to a verdict.

Blake, Q.C., and *Beor* showed cause, and cited the following cases:—

D'Arc *v.* London and N. W. Ry. Co., L.R. 9, C.P. 325; Robinson *v.* G. W. R. Co., 35 L.J., C.P. 123; McCawley *v.* Furness Ry. Co., L.R. 8, Q.B. 57; Gill *v.* Manchester and Sheffield Ry. Co., L.R. 8, Q.B. 186; Grill *v.* Gen. Iron Screw Co., L.R. 1, C.P. 600; Beal *v.* S. Devon Ry. Co., 3 H. and C. 337; Peak *v.* N. Staffordshire Ry. Co., 9 Jur., N.S. 914; Martin *v.* Gt. Indian Penr. Ry. Co., L.R. 3, Ex. 9.

The Attorney-General and *Power* in support of the rule cited—

Giblin *v.* McMullen, L.R. 2, P.C. 317; Moffat *v.* Bateman, L.R. 3, P.C. 115; Beecham *v.* Powley, 1 Mood and R. 38; Doorman *v.* Jenkins, 2 Ad. and E. 256; White *v.* G. W. R. Co., 2 C.B., N.S. 7; Squire *v.* Wheeler, 16 L.T, N.S. 93; Phillips *v.* Clarke, 2 C.B., N.S. 156; Wilson *v.* Brett, 11 M. and W. 113.

Judgment.

COCKLE, C.J.:—In this case, all the facts that are likely to come before the tribunal which tries it have been brought before the Judge and Jury. The only suggested fact that could be added is one that would not necessarily have strengthened the Plaintiff's case, and the findings show that even that suggested fact would be immaterial. Here, then, we have an investigation protracted—and, therefore, expensive—laborious, long; and, notwithstanding the singular complexity, the result is brought before us sharply and clearly in the shape of the four findings of the Jury. During this difficult investigation, no defect of any kind could be suggested beyond the microscopical one—that, possibly, the insertion of the word "or" in place of "and" in the fourth plea, might have been objected to as a variance; but that was a defect that might, and probably would, have been instantly amended, without costs, by the Judge at the trial. With the exception of that defect, there is none whatever that I can see in the case—no misdirection on the part of the Judge suggested (none successfully, at any rate); no irregularity in the trial, as far as the admission or rejection of evidence was concerned; no shortcomings on the part of the Jury; neither was there any redundance or defect in the questions put and the answers given to them. That being so, I think, unless there were some prospect of injustice being done, it would be contrary to all principle for us to do other than to draw the legal inference from the facts thus found. The findings show that there was a contract upon the condition of which we have heard so much during this case. That, of course, was necessarily put, and being answered, we take this as a case founded upon that special condition. Then, in order to see whether the case would go further, it was necessary to put the question of negligence, and the Jury found there was negligence, and a negligence to which the Plaintiff did not contribute; and of course, unless they had

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come to that conclusion, there would have been nothing further for them to find. But having found there was a case, then came the further question—Was there a gross and wilful default on the part of the Defendant? The Jury found there was not that gross and wilful default, and, in so doing, virtually found a verdict for the Defendant. Now, the legal requirements of the case for the Defendant being thus fully satisfied, I apprehend there will be nothing further for us to do than to order the verdict to be entered for the Defendant; but, in surmising the possibility of any injustice having been done, I think it is as well to point out that the view of the case so strongly contended for on behalf of the plaintiff was put to the Jury during the trial, and in the summing up of my brother Lilley, it may have seemed—and in fact it appears to have seemed—to the learned counsel for the Defendant to have borne rather hardly upon him. It is satisfactory, at all events, that that view was put. And I can see neither in the legal aspect of the case, nor in any other aspect, any reason for hesitation as to the way in which the verdict should be entered. I shall merely add that undoubtedly it would be more correct and scientific, as was observed by Mr. Justice Montague Smith, to speak of degrees of care rather than of degrees of negligence; and when words importing degrees of negligence are used, they must be taken to be used with an implied reference to the degree of care which ought to be shown. I think it well to advert to a remark thrown out by my brother Lilley in the course of the argument, that it is not to be assumed from the fact of there being no definition of degrees of negligence capable of a satisfactory interpretation in respect of cases of this kind in general, that we are to infer that, in the present case, no determinate degree of negligence can be used in relation to this particular contract. The Defendant did not exonerate himself from all duty by imposing the terms which he has done upon those who send goods by his line, and the amount of duty devolving upon him is not to be determined by the use of the terms gratuitous bailee, or bailee for reward, and so on, as used in the abstract; but by a reference to the particular nature of the contract which here must be understood as a contract by a hired or skilled bailee. I think, therefore, the verdict must be entered for the Defendant on the fourth plea. The general verdict will follow without entry.

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Judgment.

LUTWYCHE, J.:—I also think that the general verdict ought to be entered for the defendant in this case on the fourth plea. As the case presents itself to my mind, the Jury have found that there are degrees in negligence, and that the defendant was not guilty of that amount of negligence which would make him liable under the conditions of the contract. No case has been cited, although great ingenuity and research have been exercised to show that in point of law, and as a matter of law, there is no distinction between negligence and gross negligence. The distinction has been drawn and acted upon for a long series of years, and it is well, unless there be some overruling authority, not to depart from ancient landmarks. It seems to me that it was a question for the Jury; and they have virtually found the question in the Defendant's favour.

LILLEY, J.:—In this case we must take the first answer of the Jury to have established that the obligation of the Defendant was based upon a contract, and that contract was contained in a condition relieving him from his liability as an insurer in the first instance—and from all liability, in fact, except such as should arise from the gross and wilful default of himself, his servants, or agents Now, the words "gross and wilful default" were treated by counsel on both sides—and I think correctly—as equivalent to gross negligence; so that the defendant was relieved of all liability except such as should arise from gross negligence. Then, in order to ascertain what would be gross negligence on the part of the Defendant, we must have reference to the peculiar character in which he contracted with the Plaintiff. What would be gross negligence in him as a paid bailee undertaking a service in which he engages to exercise competent skill, might be ordinary or slight negligence in a person who had undertaken a gratuitous service. All the cases since the case of Coggs *v.* Bernard, and, in fact, the older law—the Roman law—seem to have acknowledged three degrees of negligence—slight negligence, ordinary negligence, and gross negligence; and unless there be no difference between negligence and gross negligence, the Plaintiff is not entitled to the verdict. I put the case fully to the Jury—first, was there negligence? and I told them that their answer to that would depend upon the degree of duty which the law and the contract (if they found the contract) imposed upon the Defendant; and that duty, I told them, was that the Defendant under this contract, having engaged for the exercise

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of the ordinary care of a competent person, that duty was that he should exercise that ordinary care; and that, if he failed to exercise that, I told the Jury that I thought it would not be a violent presumption if they found that there was gross and wilful default—in other words, that there was gross negligence. But that having been put to the Jury, they found there was a want of the ordinary care of a competent person, but refused to find that there was gross and wilful default—or, in other words, gross negligence. Then comes the question if there be—as there would seem there are, and until some cases are cited to the contrary, we must take it that there are—degrees of negligence, by whom is the question of degree to be decided? Well, now, it appears to me that the case of Beal *v.* South Devon Railway Company, which was relied on by the Plaintiff, shows that the question is not a question of abstract positive law, but is one of fact, to be determined by the Jury. I think that case supports the direction, or, at all events, the suggestion which I threw out for the consideration of the Jury—that if they found an absence or omission on the part of the Defendant to exercise the ordinary care of a competent person, it was evidence from which they might find gross negligence. As I say, they refused to find that, and therefore the findings must be taken as equivalent to a verdict for the Defendant on the fourth plea. And I think the observations of Mr. Justice Willes, who was one of the Court of Exchequer Chamber when Beal *v.* the South Devon Railway Company was decided, point to the same conclusion—that you cannot lay down to the Jury any particular degree of negligence, but you can lay down, with tolerable accuracy, the extent of the Defendant's duty; and if the Jury find that duty has not been fulfilled, then they may find that there was gross negligence. In this case, for instance, the Defendant being a bailee for hired service, I think he did not contract himself out of the duty to exercise the ordinary care of a competent person; and if he did not exercise that care, it was evidence from which the Jury might find that he was guilty of gross negligence. This question has occupied the attention of the American Courts, and I may read, probably as a matter of instruction, and as confirmative of the view we have taken in this case, some observations of Mr. Justice Curtis, in the Supreme Court of the United States. It seems that the theory of the three degrees of negligence was examined by Curtis, and he seems here to recognize that the common law

has marked or recognized the doctrine of the three degrees—slight, ordinary, and gross; and further, I think he recognized the principle that the question of degree is one for the Jury. In the case of the Steamboat New World *v.* King, 16 Howard, 262, 263, he says:—

"The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the Courts have been forced to yield, until there are so many exceptions that the rules themselves can scarcely be said to have a general operation. In Storer *v.* Gowen, 18 Maine, 177, the Supreme Court of Maine says:—'How much care will in a given case relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define.' Mr. Justice Story, Bailments, Sec. 11, says:—'Indeed, what is common or ordinary diligence is more a matter of fact than of law.' If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the Jury to determine, in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned."

Or, in other words, leave it to the Jury. In this case there was such a thing as gross negligence mentioned in the contract, and it was to be left to men of the world to say what gross negligence is, the Court having, as I said at the time, abandoned the attempt to define its legal meaning.

"Recently the Judges of several Courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. Wilson *v.* Bret, 11; Meeson and Wels, 113; Wyld *v.* Pickford, *ibid.* 443, 461, 462; Hinton *v.* Dibdin, 22 B., 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as Tracy *et al. v.* Wood, 3 Mason, 132, and Foster *v.* the Essex Bank, 17 Mass., 479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the Civil Code of France, have wholly repudiated the theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties.

"But whether this term 'gross negligence' be used or not, this particular case is one of gross negligence, according to the tests which have been applied in such a case. In the first place it is settled that

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'the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part.' Story on Bailments, section 15.

"It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence."

Mar 13 & 14.

Judgment.

In other words, as I should say, evidence of gross negligence, because the Courts have abandoned the attempt to define it.

"Thus Heath, J., in Shield *v.* Blackburne, 1 H. Bl., 161, says:—'If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery.' And Lord Loughborough declares that an omission to use skill is gross negligence. Mr. Justice Story, although he controverts the doctrine of Pothier, that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by Sir William Jones, between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists when there is a want of due skill, or an omission to exercise it."

I think the effect of the decision of the Court is this—that where a man, in any particular class of bailment, neglects or omits to discharge a duty peculiarly imposed upon him by that particular order of bailment, it is evidence of gross neglect, unless he has contracted himself out of that duty; or unless he stipulates, in fact, that he shall not be liable for anything that may occur. That not being the case here, I think the finding of the Jury was equivalent to finding—first, that there was a want of that proper care which he ought to have exercised; but they have refused to find that it was of such a degree as to amount to a gross and wilful default, or gross negligence. Such being the case, I think there is no help for us but to enter a verdict for the Defendant on the fourth plea.

Verdict to be entered for the defendant accordingly.

Rule absolute.

Attorney for the Plaintiff: *W. H. Wilson.*

Attorneys for the Defendant: *Little and Browne.*

EASTER TERM, 39 VICTORIA.

DEVINE *v.* ——— AND OTHERS, JUSTICES OF BRISBANE.

May 31.

Publican's License—Jurisdiction of Justices—27 Vict. No. 16, *Sec.* 14—28 *Vict. No.* 13, *Sec.* 8.

Justices of the Peace, at the annual licensing meeting for the consideration of applications for publicans' licenses, have full power, under the Licensed Publicans Acts, to refuse to grant any certificate for a license for which application is made to them.

Statement.

Blake, Q.C., moved for a rule, calling upon certain Justices of Brisbane to show cause why a *mandamus* should not issue commanding them to grant William Devine a certificate under the 14th section of *The Licensed Publicans Act*, 1863 (27 Victoria, No. 16), authorising a publican's license to issue to him.

THE Prosecutor's affidavit stated that he had been the holder of a publican's license, and during the time that he had held it no charge had been made against his character. On the 18th April last, an application which he had made for a license for a house in Queen street, Brisbane, came on for hearing before the Defendants, the necessary preliminaries having been previously complied with. The house contained the requisite accommodation, and no objections were lodged against the granting of the license. The Police reported favourably of the premises. The Bench, while admitting that they were satisfied with the applicant's character, refused the application without assigning any reason for so doing. The Plaintiff had spent the sum of £200 in fitting up his premises and getting them fit to be used as a public-house.

Judgment.

COCKLE, C.J :—I do not think that this rule can be granted. To do so would be to give an interpretation to the 14th clause of *The Publicans Act* directly contradictory to that which *The Acts Shortening Act* tells us to give it; for, in telling us to interpret words such as "may," or "shall," or "shall be lawful," or "may be lawful," it gives us a rule under which, in the absence of surrounding words, which do not occur here, it is imperative upon us to follow the sense indicated by the Legislature, which, I may say, in the very phraseology of this section, shows itself well acquainted with the previous legislation in *The Acts Shortening*

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Act. We find every shade of meaning running through the section. At the commencement there is "may," and then "may and shall," and that is followed again by "may," and "no such certificate shall be granted." Under the circumstances, I think we have no power whatever to issue a rule commanding the Justices to do that which, according to law, it was entirely discretionary with them to do. There will, therefore, be no rule.

LUTWYCHE, J.:—I am of the same opinion. I do not feel at liberty to fly in the face of the Legislature by holding that the words "shall" and "may" may be used interchangeably. I observe that this application, which certainly was heard and determined before the Justices, was heard and determined before a very full Bench, consisting of thirty-nine Justices of the Peace. We are not at liberty to inquire into that which was within the discretionary power they possessed. But if they came to the conclusion that it was desirable to limit for the future the number of public-houses to be opened, I must say I think it was a very wise discretion, and so am of opinion that there should be no rule. *Salus populi est suprema lex.*

LILLEY, J.:—I am of the same opinion. I think the Legislature has shown that they well understood the existing law, and the difference between the meaning of the words "shall" and "may," when used in a statute; and following down the words of the 14th section, it becomes strongly apparent, to my mind, at all events, that they had *The Acts Shortening Act* in view. In the beginning it says:—"Every such original or adjourned annual licensing meeting *shall* be held in open court, and the consideration of every application, and of every objection thereto *shall* be deemed to be a judicial proceeding." The very safety of the public, and the propriety of their proceedings, it seems to me, point to these proceedings being held openly, or considered in open Court; and, therefore, when the Legislature intended that this should be imperative, it used the word "shall." Then we find that "any person *may* oppose such application"; that is not imperative. Then when the Legislature threw a duty upon the Justices, and intended it to be imperative, they used the words "may and shall hear, inquire into, and determine all such objections," "and *may* examine on oath any witnesses." So that while the statute seems to give a discretionary power to the Justices as to the final disposal of the matter, it renders it impera-

tive upon them to hear all objections raised, and in this latter case throws a duty upon them which they are bound to exercise. Then we come to a very important part of the statute which confirms, in my opinion, that the granting or refusing the license is a matter of discretion. Although it is imperative that they should hear the application and objections thereto in open Court, the materials upon which they may found their judgment seems to be left to their discretion; because the statute says, "they may examine any witness and *may* grant to every such person as shall be approved of by such Justices, or the majority of them, a certificate in the form of the schedule hereto marked C authorising a license to issue." Then we come to another imperative portion of the section, in which the word changes from "may" to "shall"—"Provided that no such certificate *shall* be granted until the person so approved of shall have satisfied the Justices that the requisite notice has been given." This is very important—the use of the word "shall" here—because it was necessary, for the benefit of intending objectors, that it should be made imperative for the applicant to give notice. Then comes the last proviso, in which the Legislature has again used the imperative form—"No such certificate shall be granted to any person who has been convicted of selling liquor without a license until after a period of one year from the date of such conviction." Then, if we look to the certificate upon which the Treasurer is to give the license, the language is again such as to confirm me in my opinion that the power given under section 14 is discretionary, because the Magistrates in this certificate, say that the notices having been given, we do, "in virtue of the power vested in us, hereby authorise the Treasurer" to issue the license. So that again the discretionary form of expression is used. Mr. Blake rested his argument upon the 8th section of the later *Publicans Act* (28 Vic., No. 13), and argued that the applicant had a right on satisfying the Bench that there was no objection to himself personally or the locality of his house to a license. Looking at that 8th section, it appears to me that it places only this limit on the discretion given in the previous Act—it compels the Justices, on being satisfied that there is an objection to the locality, to withhold the license. So that instead of being a limitation of the Justices' discretion in favour of the publican, it is a limitation adverse to him, compelling the Justices to yield to any reasonable objection as to locality, whereas in the previous Act

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there was a discretion even as to locality; the Justices might or might not refuse a license, even if a valid objection to the locality were made. For these reasons, I think we have no power to interfere with the discretion of the Justices. Then, if we look to the reason of the matter, I can well see that the Legislature might intend—deliberately intend—to place this discretion in the Bench. We know that Magistrates, although compelled as a matter of public policy, and for the safety of the community, to decide on certain cases judicially, our old English notions still invest them with a kind of domestic interference, or authority in the districts in which they exercise their functions. They are the conservators of the peace; and it may well be that the Legislature intended to leave to them, as a question of judgment, whether any locality was sufficiently supplied or overstocked with houses of entertainment, or places where travellers can be received. Whilst they might regard a limited number of public-houses as an advantage to the community, they might very well dread an undue spread or increase of establishments of the kind. I think, therefore, both upon the language of the statute and the reason of the thing, it is a discretion placed by the Legislature in the Bench.

Rule refused accordingly.

Attorneys for Applicant: *Roberts, Liddle, and Roberts.*

FERRETT v. BARLOW AND OTHERS. May 31.

FERRETT *v.* BARLOW AND OTHERS.

Assessment for rating purposes by Municipal Council—Appeal—Jurisdiction of Justices—28 Vict., No. 21, sec. 79.

The decision of Justices in Petty Sessions upon an appeal from the assessment of property for rating purposes by a Municipal Council is final, and the Supreme Court has no power to disturb it.

Statement.

THE Plaintiff obtained a rule calling on the Defendants to show cause why a writ of prohibition should not issue to restrain them from further proceeding upon an order made by them confirming an assessment for rating purposes of certain property of the Plaintiff's, made by the Municipal Council of Ipswich.

At the last assessment of property in Ipswich for rating purposes for the current year by the Municipal Council, two allotments of land belonging to the Plaintiff were assessed as unoccupied property. The Plaintiff appealed to the Petty Sessions of the district against the assessment. The allotments had no residence upon them, and the Chairman of the Petty Sessions, before hearing the appeal, stated that the Bench laid it

down as a principle, that where lands had no residence upon them, they were unoccupied within the meaning of *The Municipal Institutions Act of* 1864. It was proved that the property was rented to a tenant who paid a rent considerably less than the sum at which the land had been assessed, but the Defendants confirmed the assessment.

May 31.

Statement.

The Attorney-General (*S. W. Griffith, Q.C.*) showed cause, and cited Robinson *v.* Briggs, L.R. 6, Ex. 1.

Garrick in support of the rule.

The judgment of the Court was delivered by

Judgmen

LILLEY, J.:—In this case, when application was made to me for a rule *nisi*, I pointed out that it appeared to me that the statute, by section 79, made the determination of the Justices, on an appeal of this kind, final. It was pressed upon me, however, as a matter of great general importance, that a decision should be had, if possible, from this Court, and that led me to scan the language of the section narrowly, and I felt that there was some doubt—at least, that it was an arguable point—upon which the opinion of this Court might be taken—Whether the appeal to the Assessment Court was actually final or not. The preliminary portion of the section enacts that "If any person shall think himself aggrieved by the value at which his property has been assessed at the assessment thereof," he may appeal to the Justices; and then the latter portion of the section enacts that "the decision of the Justices in Petty Sessions shall be final as regards the matter of appeal." The pressure, therefore, upon my mind was to discover—Whether the words "matter of appeal" were so qualified in this section as under some particular circumstances to make an appeal of this kind non-final—to deprive it of its finality. Then it became important to see what was the matter of appeal. It was urged that the matter of value was not so much an object as the broad general principle of the rate; and yielding to that so far as to concede that it was arguable, I granted the rule *nisi*. But on looking at the words of the section now, after hearing the arguments of counsel, to ascertain what was the matter of appeal, I think that by the words "the value at which his property has been assessed," the subject-matter of the appeal was not limited so narrowly, and did not confine it to a matter of calculation, because, on looking at other portions of the Act, especially section 81, I find that before you

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can determine upon the value at which the property is to be assessed, there is a preliminary inquiry—Whether it is occupied or unoccupied? It was therefore necessary that the Justices should decide whether it was occupied or unoccupied, and that would be part of the matter of appeal. Well, as the matter of complaint here is, that the Justices decided that this property was unoccupied, whereas it was really occupied, the Court is of opinion that the matter was open to, and rightly, within the jurisdiction of the Justices to determine both as to value, and certainly the preliminary question of occupancy or non-occupancy. That being, then, the matter of appeal, it appears to the Court that the matter was final, and that we have no jurisdiction to give a prohibition against the Justices. I am myself convinced that my first impression was right, when I was applied to to grant the rule *nisi*. It would be well, perhaps, if questions of this kind could be raised for the decision of this Court by way of special case. This question might affect the members of municipalities—the ratepayers—to the extent of many thousands, and a decision upon an erroneous principle may lay a heavy charge upon them from some error on the part of the Justices. It would, perhaps, be more satisfactory if they had an appeal to the Supreme Court, and we think it would be well if the law were so amended as to allow a special case being stated. We simply throw this out as a suggestion. Here, for instance, the parties come before the Court anxious to get its opinion, which we are unable to give from want of jurisdiction. The rule will therefore be discharged, but, considering the circumstances of the case, without costs.

Rule discharged without costs.

Attorneys for the Plaintiff: *Thompson and Hellicar.*

Attorney for the Defendants: *C. Chubb.*

DUNCAN *v.* WOOD.

Attachment—Mortgagee—Garnishee—31 Vict. No. 4, secs. 35, 36, 38—17 and 18 Vict., c. 104—25 Vict. No. 14.

A mortgagee, whether in possession or out of possession, cannot be made a garnishee under *The Common Law Process Act*, 1867, in respect of his securities either real or personal.

Statement.

A WRIT of attachment against lands, &c., the property of the Defendant, in the hands of E. B. C. Corser and Co., garnishees, was obtained by the Plaintiff. The garnishees claimed to be entitled as mortgagees of the lands, &c., and contended that a mortgagee cannot be made a garnishee in respect of his securities.

The Attorney-General (*S. W. Griffith, Q.C.*) was for the Plaintiff; *Harding* for the Garnishees.

The following cases were cited:—Sardon *v.* Hooper, 6 Beav., 246; Crisp *v.* Platel, 8 Beav., 62; Watts *v.* Lyne, 1 De G., M. and G., 240; Demanby *v.* Metcalfe, 2 Vern., 690.

Judgment.

LILLEY, J.:—The Defendant being absent from the colony, the Plaintiff obtained, on the 15th February last, a writ of attachment under *The Common Law Process Act of* 1867, upon certain lands, personal estate, and chattels, alleged to be the property of the Defendant, in the custody and control of Corser and Co., who were served with the writ as garnishees. It appears on the evidence since taken before myself and a Commissioner, that the property consisted of real estate at Waitemata and Polson, of two ships, of valuable ballast, of cattle, and of promissory notes the proceeds of freight or passage money earned by the ships in carrying South Sea Islanders. Mr. Corser, who was examined, set up title on behalf of his firm as mortgagees of the real estate, ships, and cattle, and denied the right of the Plaintiff to attach any portion of the mortgaged property in his hands, his contention being that *The Common Law Process Act* does not apply to the case of a mortgagee, who he contends cannot be made a garnishee in respect of his securities either real or personal. Section 35 of the Act shows that the property to be bound by the attachment is "All and singular the lands, hereditaments, moneys and chattels, bills, bonds, and other property of whatsoever nature in the custody or under the control of such garnishee then belonging to the Defendant, or to or in which the Defendant shall then be legally or equitably entitled, or otherwise

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beneficially interested, &c., &c." In order to ascertain whether the Legislature intended a mortgagee to be made a garnishee, we may usefully trace the course of legislation on this subject, and must, of course, regard the law of property, real and personal, and the rights and relations of mortgagor and mortgagee at each distinct period. Sections 29 to 45 of the Act are re-enacted in the "Consolidation" from the 4 Vic., No. 6. The law of property at that time made a mortgagee the owner of the land mortgaged to him subject to a right or equity of redemption by the mortgagor on payment of the principal and interest. The same law applied to chattels. All, therefore, that "belonged" to the mortgagor was this equity or right of redemption, which was not in the "custody" and still less under the "control" of the mortgagee, who could not deprive the mortgagor of it, or hinder him in asserting it. It was an intangible thing not in the "possession" of the mortgagee, even when he had the physical possession of the estate. Unless, therefore, some kind of chattel estate was excepted by special legislation or common law from the general rule, there would appear to have been nothing in the custody or control of a mortgagee belonging to a mortgagor which could be attached at the time of the passing of the 4th Vic., No. 6. This observation applies to the ships. It is difficult to ascertain what was the law of registered shipping in the colony at that time. The law was established by Governor's proclamations, but I think we may safely assume, from all our early colonial legislation, that it did not essentially differ from the law of England. Before the passing of Lord Liverpool's Act, 26 Geo. 3, c. 60, a mortgage of a ship would have the same effect as that of any other chattel at common law; it would leave only the right of redemption, and would, therefore, be no exception to the rule I have stated. Between the 26 Geo. 3 and 6 Geo. 4, however, it was doubted whether a mortgage with the statutory forms did not necessarily transfer the whole interest, and whether there was, in fact, any equity of redemption. The better opinion would appear to have been that there was; so that on the assumption that our colonial law did not differ from that of the mother country, the general rule would seem to have prevailed here. Since the passing of the 6 Geo. 4 (the first of the later Registry Acts), all doubt as to the right to redeem has ceased, and as I find no special colonial proclamation or Act placing property in ships on a different footing, the rule was

still the same, and the mortgagee would have nothing in his custody or control belonging to the mortgagor which could be attached under 4 Vic, No. 6. The Act under which this writ of attachment has been issued was, however, passed in 31 Vic., and a question of some nicety arises whether our *Real Property Act*, 25 Vic., No. 14, and the 17 and 18 Vic., c. 104—*The Merchant Shipping Act of* 1854—have altered the nature of a mortgagee's title so as to render the first-named Act applicable. These two Acts last mentioned, although not identical in language, are (the *Real Property Act* being founded on the Shipping Acts) similar in principle, which is this:—The mortgagee does not now become the owner of the mortgaged property "except," says the *Shipping Act*, "so far as may be necessary for making such ship or share available as a security for the mortgaged debt"; and our *Real Property Act* declares that the mortgage "shall operate and take effect only as a security for the sum of money intended to be thereby secured." Both Acts give the mortgagee rights beyond those of an ordinary lienee. He may take the rents and profits of realty, he may take possession of realty or personalty, he may sell, and in respect to both classes of property, he may give an absolute indefeasible title to a purchaser. Although he has no legal estate himself, he may pass one to his purchaser, according to the nature of the property. Neither Act has altered the relation of the mortgagee to his mortgagor, as it existed independently of the Acts, and he may still exercise all his powers and pursue all his remedies, he may consolidate his securities and demand redemption of all, he may require the mortgagor to redeem if he seeks an account, &c., &c. Does the alteration in the law between the 4 Vic. and 31 Vic., that the legal estate or property shall no longer vest in the mortgagee, bring him within *The Common Law Process Act* as a garnishee? It would be difficult to say that a mortgagee out of possession had either the custody or control of the property. But in this case Corser and Co. are mortgagees in possession of all the property except a farm called "Waitemata." I think that must be left out of consideration, and the question answered with reference to the property in their possession. If the provisions of 4 Vic. had not been re-enacted in 31 Vic., after the change in the law of property, the question could be answered at once—No. But as the statutes stand, it will require a more extended review of the language of *The Common Law Process*

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Act (31 Vic.) to ascertain whether it indicates a mortgagee—whether the remedies it gives a plaintiff are consistent with the rights and remedies of a mortgagee—whether it makes provision for preserving the latter, or whether, if such provision be absent, it does not show that these sections of the Act were not intended to have a wider operation than they had when they formed a part of the 4 Vic., No. 6. In the first place, then, is a mortgagee in possession a mere "custodian or controller" of property over which he may exercise rights of absolute ownership by sale? I think not. Is it consistent with the power of sale given him by the statute regulating his contract that he should be liable in damages for exercising it otherwise than for the use of the Plaintiff (sec. 35)? Is it consistent with his contract that the Judge should be enabled to order part or parts of the property to be holden for the satisfaction of the Plaintiff, without any provision, even, for valuing the mortgagee's security? Can the mortgagee's security be correctly called in legal language, which the Legislature is supposed to use, "a claim or lien"? Is it not something higher? I think it is. It seems to me, therefore, that the rights and remedies given to a Plaintiff are such as might, without inconvenience, be given to him against property in the hands of a mere casual custodian or controller, subject to a temporary or incidental claim or lien, but not against the more extensive rights of a mortgagee. The statute says that the property is to be attached, subject to "any *bona fide* prior claims or liens thereon." Does it make provision for preserving and enforcing the rights and remedies of a mortgagee? It makes no provision for taking the mortgagee's account. It merely gives a right to examine the garnishee in a "summary way"; and that this is not an account—taking between mortgagee and mortgagor—is obvious from the fact that there is no provision for redemption when the examination is taken. In Equity, the prayer for an account is in general equivalent to an offer to pay the balance to the mortgagee, but here the statute makes no such provision to protect the garnishee. If the Plaintiff's contention be right, he would be entitled to call the mortgagee to an account without the correlative obligation of discharging his mortgage debt or the balance. This would confer on him a right more extensive than that of the Defendant, the mortgagor. I need not multiply instances. It is sufficient to say there is no provision for consequential relief

which follows a declaration of right in equity, unless by statutory exception. *The Common Law Process Act* provides no machinery, either legal or equitable, for the adjustment and enforcement of a mortgagee's rights and interests, and its absence indicates that there was no intention to include him as a garnishee. It seems to me that the absence of these provisions shows the law has not been extended, and that Corser and Co. cannot be made garnishees either as mortgagees in or out of possession of the real estate, even if that be under our *Real Property Act*, and certainly not if it remains under the old Common Law, nor of the ships, cattle, or other property under their mortgages. The Plaintiff, however, claims that, if not entitled to those, he has a right to attach in Corser and Co.'s hands, a quantity of ballast valued at about £450. The evidence certainly does not show that this ballast is in their possession, and if it is, Corser says that everything is included in his mortgage. This may be his construction of the deed, which is not, nor are any of the deeds, before me. In law, ballast does not pass by a transfer of the ship and its furniture. I have no evidence to justify me in continuing an attachment on property not shown to be in their custody or control, nor to have any present existence anywhere. The only remaining item of property on which the plaintiff makes a claim is, I think, the promissory notes due for the freight or passage-money of the Islanders. These notes are for earnings of the ships since Corser and Co. became mortgagees. It seems they have been received since they took possession, and since the Defendant left the colony in September, 1875. The mortgagee takes the right to receive the earnings as incident to the ship. Corser and Co. seem throughout to have been in possession in the combined character of agents and mortgagees. Moreover, the notes appear to be in Corser and Co.'s name, who appear to have found the moneys for the various voyages. I think the attachment cannot continue on these notes.

Supposing, however that Corser and Co. could be liable to an attachment of property in their possession as mortgagees, they contend that there is nothing after satisfying their claim which "can be made available to satisfy the Plaintiff's cause of action," but that in fact the property is not of value equal to the Defendant's indebtedness to them. An intricate mass of accounts has been filed, but so far as particulars are stated in the evidence, it appears that on the 15th February, when the

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writ was served on them, the properties were valued (exclusive of the ballast and promissory notes) at £4,650, whilst the Defendant's debt to them was £7,229 9s. 2d., and in March was £6,174 4s. 6d. The whole of the outstanding accounts would not cover the deficiency. It is not possible to discover from the evidence how much of the outstanding accounts for the ships is covered by promissory notes, but the amount of the promissory notes detailed in the evidence is far—very far—below the total of the unpaid accounts. I have prepared an account of the five trips of the two ships; but from the evidence, one large item—for repairs—which the mortgagees would be allowed, so far as they were necessary, may or may not have been added to the items of expenditure. If it has been so added, and if all the outstanding accounts should be paid, there would be a profit. If the sum for repairs has not been added to the expenditure, there would be a loss on the working of the ships, and nothing to attach. In the view I take of the law, and the rights of the mortgagees, it is not material whether there was a profit or loss, and I have prepared and will append the account merely for use, should it be hereafter required. The attachment will be wholly dissolved. I allow the garnishee the reasonable expenses of his attendance before me in Brisbane and before the Commissioner, and I reserve leave to the parties to be heard on the general question of costs beyond that I have already allowed within the time I have fixed.

Attorney for the Plaintiff: *P. Macpherson.*

Attorneys for the Garnishees: *Lyons and Chambers.*

TRINITY TERM, 40 VICTORIA.

RE KERMODE.

Justices of the Peace—Protection Order—Prohibition—28 Vict. No. 29, sec. 11.

September 5.

Justices of the Peace, when granting a protection order under the 11th section of 28 Vict., No. 29, are not restricted to granting an order to take effect from the date of the desertion of the wife by her husband, but may grant an order to take effect from any date subsequent to the date of the desertion at any time during its continuance. The Court will not interfere with the power of the Justices to discharge such an order unless they have been clearly wrong in exercising it.

Statement.

RULE calling upon certain Justices of Gympie and William Scott to show cause why they should not be restrained from further proceedings in respect of an order made by the said Justices, and dated the 17th day of May, 1876.

The following statements appeared in the affidavits filed in the matter:—

The applicant, Jane Kermode, a married woman, was deserted by her husband, Thomas William Kermode, in April, 1875. In 1876, Scott obtained a judgment against the husband for £20, and subsequently an order to protect her property and earnings from her husband and his creditors was obtained by Jane Kermode from the Justices of Gympie abovementioned. An affidavit made by the attorney who represented her when the order was granted, stated that he applied for an order protecting her earnings and property acquired since the commencement of the desertion. The Justices, however, stated that they intended the order to take effect only from the day when it was made. The applicant's attorney drew up the order in the form in which he stated that he applied for it, and it was signed by the Justices in that form; but afterwards, upon it being represented to them that the order would have the effect of protecting all earnings and property acquired since the date of the desertion, they made a second order by which they discharged the previous one. It was in respect of the second order that the rule was granted.

The Attorney-General (*S. W. Griffith, Q.C.*) in support of the rule.

Power showed cause.

COM. LAW.
Re KERMODE.
September 5.
Judgment.

COCKLE, C.J.:—Under the 11th section of *The Matrimonial Causes Act*, Justices may make and give an order for the relief of the wife in order to protect her earnings and property acquired since the commencement of such desertion. But it seems to me that they may give a less extensive order if they see reason to think that a more extensive one may work injury. At all events, here, the inference, I think, to be drawn from the evidence is, that they were asked to make an order to protect her future earnings, and intended only to make such an order. Under a provision in the same section, the Justices by whom the order was made, were applied to for the discharge thereof, and although some evidence perhaps might be required, it would demand no very great amount of evidence to discharge an *ex parte* order. Here, unless we could say that the decision of the Justices in discharging the order was wrong, why the order of discharge ought to stand, and when they who must have the best means of knowing the facts unanimously concur in stating that no such order as that drawn up was ever made by them, this Court would be going out of its way to say that they were wrong. It is unnecessary to express any opinion as to what the form of the order should be, and if any date was specified it might be taken as an admission against the statement of the woman in whose favour it was made. I think on the whole, therefore, that the rule must be discharged, and with costs.

LUTWYCHE, J.:—I am of the same opinion. It seems to me that the Legislature never intended, when they gave the Justices a discretionary power to grant a protection order, to limit the discretion of the Justices by saying in fact this:—If you make an order it must be made to operate from the commencement of the desertion. I find nothing in the language of the statute which authorises such a construction, and much from the circumstances of convenience which would argue in favour of a different construction to that for which the learned Attorney-General contended. As I think it has been pointed out during the argument, the wife might not have any property at the time of the commencement of the desertion, but might acquire some afterwards; and an order drawn up so as to include her earnings from the commencement of the desertion would be erroneous. In fact, it seems to me that the Magistrates had power both to make and to unmake an order for the protection of a married woman's property and earnings, and it seems to me, also, that the matter,

in both cases, is left to their discretion. They are the best judges of the propriety of enforcing or reversing an order of that kind. They are better acquainted necessarily with the circumstances of the parties than this Court can be, and unless it can be shown that they are—to use a phrase adopted in New South Wales—demonstrably wrong, this Court would hesitate, I take it, before they interfered and reversed their decision. They say, it seems to me, they never made the order which was drawn up by the officer of their Court, except so far as signing it; but they did so under an erroneous impression, and when the application was made to them to discharge the order which had been granted *ex parte*, they might well, from their own recollection, state:—"We never intended to make such an order; we never, in point of fact, made it; the signature was a mistake, and it ought to be discharged; but we will, if you think proper to make an application in the usual and formal manner, give you an order to protect the wife's property from the same date as that on which the order was drawn up." That being so, I think the rule ought to be discharged, and with costs.

LILLEY, J.:—I am of the same opinion. The Magistrates made the order they were asked to make, namely, to protect the future property and earnings of the wife. When a Magistrate or Judge has made an order, he reposes confidence, as he is justified in doing, in the officers of the Court, to draw it up in accordance with the decision actually given. It seems, in this case, that the order did not follow the deliverance of the Court. It was an order much more extensive than the Magistrates had given to the wife. They, relying on the accuracy of the record as prepared by the officer of the Court, signed it; but it would seem an error had crept into it. It is not necessary, perhaps, to say that there was any intention on the part of the solicitor who altered it to make any fraudulent use of the document for the purpose of extending the order. It is enough that the Magistrates signed the altered document in confidence that it was the order made by them in Court. Subsequently, under the power given by the statute, a creditor brings the matter before them, and points out that the order did not follow their decisions as stated in Court. They are, as pointed out by the Chief Justice, the parties from whom alone the evidence can be obtained; it is unnecessary for them to place themselves on oath, and say to each other that this order was not in accordance with their deci-

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sion—they knew it. They acted upon the production of the order drawn up, and were at once able to say—"That is not the order we intended to make, and we rescind it" I think it perfectly in accordance with the power given them by the statute. That being so, I think they had a perfect right to limit the order, and must be upheld in their decision. I think, therefore, the rule must be discharged, and with costs.

Rule discharged with costs.

Attorneys for Kermode: *Tozer and Smith*, Gympie

Attorneys for the Justices of Gympie: *Lyons and Chambers.*

HOBBS *v.* BRISBANE MUNICIPALITY.

Sept. 12.

HOBBS *v.* THE MUNICIPALITY OF BRISBANE.

Municipality—Street—Construction—28 Vict. No. 21, sec. 75.

The Municipal Institutions Act, 1864, empowers municipalities to construct streets without payment of compensation to persons injuriously affected by the construction.

The word "construction," in the 75th section of the Act, includes the levelling down as well as the levelling up of streets.

CROSS-DEMURRERS.

Statement.

THE first ten counts of the declaration were for damage to the Plaintiff's enjoyment of certain portions of his land by the Defendants cutting away and levelling the surface of a street adjacent to the land, and thereby interfering with the Plaintiff's access to the land and his right-of-way over the street.

The eleventh to the fifteenth counts, both inclusive, were for damage to the Plaintiff's enjoyment of the same portions of land by the Defendants removing the support which the Plaintiff was entitled to have for them from the land adjacent to them.

The sixteenth to the twentieth counts, both inclusive, were for the Defendant's negligence in removing land adjacent to the same portions of the Plaintiff's land.

Fifth plea, as to the first ten counts, that the city of Brisbane was at and before the time of the alleged grievances a municipality, duly established under the provisions of *The Municipal Institutions Act of* 1864, and the Council thereof for the time being had then been duly incorporated under the provisions of the said Act by the name of "The Municipality of Brisbane," and the Defendants are the Council of the said Municipality; and that the closes and public highways, and the ground over

which the said highways respectively passed in the said counts respectively mentioned, were at the time of the alleged grievances and still are within the said Municipality, and the said public highways then were, and always have been, public streets within the meaning of the said Act, and then were subject to the provisions of the said Act, and the Defendants were charged with the care, construction, and maintenance thereof, and thereupon the Defendants, under and in exercise and by virtue of the powers and provisions contained in the said Act in that behalf, and for the purpose of and in the course of constructing and levelling the said public streets and not otherwise, committed the several acts in the said counts respectively complained of, as they lawfully might, which are the alleged trespasses.

Sixth Plea, as to the said first ten counts, that the several allegations contained in the fifth plea are respectively true in substance and fact, and further, that in constructing and levelling the said public streets as aforesaid, the Defendants did no more damage than was necessary in that behalf.

Seventh Plea, as to the eleventh, twelfth, thirteenth, fourteenth, and fifteenth counts of the declaration, that the city of Brisbane was at and before the time of the alleged grievances a Municipality duly established under the provisions of *The Municipal Institutions Act of* 1864, and the Council thereof for the time being had then been duly incorporated under the provisions of the said Act by the name of the "Municipality of Brisbane," and the Defendants are the Council of the said Municipality, and that the land, and the lands, houses, and buildings of the Plaintiff, and the lands adjacent thereto respectively in the said counts respectively mentioned and referred to were at the time of the alleged grievances, and still are, within the said Municipality, and that the said lands adjacent to the said lands, houses, and buildings, and to the said land of the Plaintiff respectively, then were, and had been for a long time prior thereto, and still are, public streets within the meaning and subject to the provisions of the said Act, and the Defendants were charged with the care, construction, and maintenance thereof, and thereupon the Defendants, under and in exercise and by virtue of the powers and provisions contained in the said Act in that behalf, and for the purposes and in the course of constructing and levelling the said public streets and not otherwise, committed the several acts

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in the said counts respectively complained of, as they lawfully might, which are the alleged trespasses.

Eighth Plea, as to the said eleventh, twelfth, thirteenth, fourteenth, and fifteenth counts of the declaration, that the several allegations contained in the seventh plea are respectively true in substance and fact, and further, that in constructing and levelling the said public streets as aforesaid they did no more damage than was necessary in that behalf.

Ninth Plea, as to the sixteenth, seventeenth, eighteenth, nineteenth, and twentieth counts of the declaration, except as to so much thereof as alleges that the Defendants negligently and unskilfully committed the acts complained of, that the city of Brisbane was at and before the time of the alleged grievances a Municipality duly established under the provisions of *The Municipal Institutions Act of* 1864, and the Council thereof for the time being had then been duly incorporated under the provisions of the said Act by the name of the Municipality of Brisbane, and the Defendants are the Council of the said Municipality, and the Defendants say that the land and the lands and buildings of the Plaintiff, and the lands adjoining the said land and lands and buildings of the Plaintiff respectively in the said counts respectively mentioned were at the time of the alleged grievances, and still are, within the said Municipality, and that the said lands adjoining the said land and lands and buildings of the Plaintiff respectively, then were and had been for a long time prior thereto, and still are, public streets within the meaning and subject to the provisions of the said Act, and the Defendants were charged with the care, construction, and maintenance thereof, and thereupon the Defendants under and in exercise and by virtue of the powers contained in the said Act in that behalf, and for the purpose of and in the course of constructing and levelling the said streets and not otherwise, dug away and removed portions of the soil over which the said public streets passed, as they lawfully might, which are the alleged trespasses.

Tenth Plea, as to the said sixteenth, seventeenth, eighteenth, nineteenth, and twentieth counts of the declaration, except as to so much thereof as alleges that the Defendants negligently and unskilfully committed the acts complained of, that the allegations contained in the ninth plea are respectively true in substance and fact, and further, that in digging and removing the said soil

for the purposes aforesaid, they did no more damage than was necessary in that behalf.

Demurrer to the above pleas and joinder.

Second replication to the fifth and sixth pleas, that the constructing and levelling of the said public streets was accomplished by the digging away and lowering of the natural surface thereof, and not by the raising of the same.

Demurrer and joinder.

Statement.

Blake, Q.C. (*Harding* with him), for the Plaintiff.

The Attorney-General (*S. W. Griffith, Q.C., Garrick* and *Cooper* with him), for the Defendant.

The following cases and text-books were cited in the argument:—

Hammersmith and City Railway Co. *v.* Brand, L.R. 4, H.L. 176; Proctor *v.* Mainwaring, 3 B. and Ald., 145; Maxwell on Statutes, 179; Jones *v.* Festiniog Railway Co., L.R. 3 Q.B. 733; Ricketts *v.* Metropolitan Railway Co., L.R. 2., H.L. 175.

Judgment.

COCKLE, C.J.:—If the facts really are as stated on these pleadings—which, however, we do not assume, except for the purpose of giving judgment upon them—no doubt something has been suffered by the Plaintiff which he may well deem a serious injury. But it was for the Legislature to consider that; and, although the omission by the Legislature to make any provision for compensation in such cases as this might induce the Court to look more cautiously into the interpretation of the Act, yet the absence of a compensation clause would hardly justify a tribunal in materially varying the construction which they would otherwise put on a given passage. Now, Mr. Blake directed his argument principally to certain inferences to be drawn from the use of the word road; but on the pleadings it is not the fact of the *locus in quo* being situated near a road that is insisted upon, but stress is laid upon the fact of the acts done by the Defendant having been done in a public street; and instead of the learned and interesting passages that have been cited from learned works, probably more light would have been thrown upon the point if our attention had been directed to the etymology of the word "street," so that we might have gone back to our dictionaries, and have seen that the word "street" was derived from

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the Latin word *strata—via strata;* and hence the name Watling street at home comes from the word *strata.* But while great erudition has been expended on the word "road," little has been bestowed on the word "street." Now, undoubtedly the word "construction" might be made applicable more closely to "street" than to "road," although I am far from saying that in the natural interpretation of this 75th clause of *The Municipal Institutions Act* the word "construction" does not apply with full propriety to "road," and it is only necessary to say that, as applied to street, it would appear to be more proper. In constructing a street, various matters would have to be done that would fall fairly within the meaning. It has been said we ought to construe this section by applying the terms respectively—*singula singularibus;* but that is a mode of construction which is open to a great deal that is arbitrary and capricious, and ought not to be lightly resorted to. I see no necessity for resorting to that principle of construction here; and I prefer to take what seems to me the more obvious way to construe the three words, "care," "construction," and "management," as applied in their totality to the authority intended to be given by the clause, and to take the rest of the words from "public streets" down to "public thoroughfares," as applying to the objects upon which the authority was to be exercised. I take it that "care, construction, and management" may mean, if necessary, "care, making, and management," or, to go further, "establishment and management," for power is given to establish even ferries where they did not before exist. Then, that being so, what is there on the pleadings to show that the authority exercised was in excess of the authority given by the words "care, construction, and management," and what is there to show that the object on which the authority was exercised was other than an object comprised within the term "roads and public thoroughfares"? If, indeed, there were any invasion of another person's private lands, it is very probable the Court would have to take an entirely different set of questions for its consideration; but here it would appear that the act which has been done by the Defendants has been done upon a public street, and there has been no direct invasion, at all events, of the land which was not within the scope of the authority given by the words "care, construction, and management." I think, therefore, inasmuch as this is the only point we have to decide, that, so far as I am concerned, the judg-

ment of the Court should be for the Defendants on the whole record.

LUTWYCHE, J.:—I am of the same opinion. As this case has occupied the attention of the Court for very nearly six hours, I shall be as brief as possible. In the first place, as was observed by Mr. Baron Parke, in Lindus *v.* Pound (2 M. and W., p. 240), "It is a sound principle of construction to suppose that people mean what they say"; and I adopt that observation now. The Legislature has said that the Municipality of Brisbane shall have the "care, construction, and management of roads, public streets, bridges, ferries, wharves, jetties, and public thoroughfares"; and it seems to me that upon the fair and obvious construction of that sentence, that the words "care, construction, and management" govern all the words that follow. It has been contended that the word "construction" should be applied only in its primary and etymological sense; but the primary sense and the etymological sense are not the same sense in which they should be used when applied to the construction of an Act of Parliament. We were favoured by the learned counsel, Mr. Blake, yesterday, with a reference to the case of Lady Hewley's Charities (9 C. and F., 525), for the sake of an observation made by Mr. Justice Coleridge; but in the same case, that learned Judge says that "by the primary meaning of a word is not meant its etymological meaning, but that which the ordinary usage of society affixes to it." The Court, therefore, is not confined to that restricted signification which the learned counsel would have us to attach to the word "construct." It has a much greater width of meaning; and I cannot come to any other conclusion than that the Legislature intended to apply it in the same sense as that in which they use the word "make" further on. In the proviso which follows the enacting part of the clause they have used the words "fully made and completed"; and that seems to be equivalent to the word "constructed," and would equally apply to the words which follow it. Certainly the word "construct" is not to be restricted in its meaning to the interpretation put upon it by engineers and architects when speaking of it in scientific treatises; and if there were any doubt upon the point, we might fairly refer to the rule of interpretation which is universally admitted in the profession to be correct. If there be a doubt about the meaning of words in a statute, it is desirable, with a view to discover the intention of the legislators, to see what

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was the interpretation put upon it by contemporary members of the profession. In page 562 of "Dwarris on Statutes," "Great regard," says Lord Coke, "ought, in construing a statute, to be paid to the construction which the sages of the law who lived about the time, or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time the law was made." There are members of the bar, in addition to the present occupants of the Bench, who are living witnesses of the state of the streets of Brisbane at the time when this Act was passed in 1864. If there was a Telford, or a Macadam, or a Sir Henry Parnell, amongst us, their lights were certainly hidden under a bushel; and I for my part cannot believe that the scientific knowledge which such men as I have mentioned possessed had become so familiar to the Legislative mind as to induce them to use the word "construction" in the strict sense which the learned counsel contends for. I am of opinion that there ought to be judgment for the defendants upon this demurrer on the whole record.

LILLEY, J.:—I have been all along and am still of the same opinion. This interpretation of the statute may work, and probably will work, serious mischief to the Plaintiff, but we are bound by the law. If this statute in rising the word "construction" authorises the act of the Municipality in levelling this part of the surface in front of the Plaintiff's allotment, why, then, there is no wrong, and there can be no remedy; and this action must necessarily fail—at all events, the plea will be a good answer to the Plaintiff's claim. Now, Mr. Blake's argument appeared to my mind to be directed to merely one portion of the acts of the Defendants;—they are not at liberty, he says, to cut down this hill if it would leave the Plaintiff's allotments in the air—deprive him, in fact, of his right-of-way. But we must look to the language of the statute. In it the Corporation are authorised to construct a public street, and we have to see, in enabling us to interpret the word "construction," what a public street really is. Now, a street may be said to be a way through a town or city; it is a surface prepared for traffic, and in the construction of that, we know as a matter of actual experience there must be a levelling up and a levelling down, the paving, the guttering, the laying even of water-pipes and lighting, and the complete furnishing of the street—constructing the street, in fact, with all the appliances of modern life. It seems to me

that everything that makes a street passable or convenient or safe would be construction within the meaning of the Act, and that is not the limitation which was so strenuously insisted upon by Mr. Blake for the Plaintiff. In my view, the pleas are a good answer to the Plaintiff's claim, and there must be judgment for the Defendants upon the whole record.

Sept. 12.

Attorneys for the Plaintiff: *Hart and Flower.*

Attorney for the Defendants: *P. Macpherson.*

CUTMORE *v.* ASH.

Ca re.—Ca. sa.—Exoneretur—38 *Vict. No.* 5, *secs.* 75, 76.

Oct. 3.

The Defendant having been arrested under a writ of *ca. re.*, issued at the suit of the Plaintiff, and a writ of *ca. sa.* having been issued to fix the bail, he was bailed, and shortly afterwards became insolvent. Subsequently to the insolvency, the Plaintiff signed judgment in the action upon which the writ of *ca. re.* was obtained.

Held, that the Plaintiff was not entitled to a render of the Defendant into custody by the bail in order to have terms imposed.

Held, also, that the existence of the *ca. sa.* was no obstacle to the entering of the *exoneretur* on the writ of *ca. re.*

Statement.

The Attorney-General (*S. W. Griffith, Q.C.*) moved to make absolute a rule calling upon the Plaintiff to show cause why an *exoneretur* should not be entered upon the bail piece upon a writ of *ca. re.* issued against the Defendant at the suit of the Plaintiff.

Harding showed cause.

Judgment.

COCKLE, C.J.:—The Defendant was bailed upon a *ca. re.*, and became insolvent before judgment. A *ca. sa.*, I presume under section 53 of *The Process Act*, has issued to fix the bail. Section 75 of *The Insolvency Act* has deprived the Plaintiff of any remedy against the property or person of the insolvent except in manner directed by that Act. The Defendant is not in custody, but the Plaintiff asserts a right to have a render into custody in order that he may have terms imposed. The order made under section 76 on one or two occasions by my brother Lilley has, I believe, been, that the insolvent should give bail till he pass his last examination, or be discharged without bail on satisfying his creditors that he has given up all his property. In such terms, there is nothing to enable a Plaintiff to benefit himself at the expense of other creditors. Assuming (which I do not assert) a right to have further terms imposed on an insolvent who obstructs a Plaintiff in realising or dealing with a security,

COM. LAW. 1876. CUTMORE v. ASH. Oct. 3. Judgment.

still the question arises—Can a Plaintiff insist upon a render in order to enable him to enforce such right? It would be strange if a Plaintiff who could neither arrest a Defendant nor charge him in execution should be able to sue out a *ca. sa.* for the purpose of compelling bail to render him, not in satisfaction (see Ch. Forms, 1866, p. 425, form 10), but for the purpose of having terms imposed. The only terms beneficial to the Plaintiff individually which occur to me as capable of being imposed, would relate to securities of which it does not appear that the Plaintiff is the possessor. And if he were, I could hardly say that the bail have taken upon themselves any obligation to assist him in that matter. According to the recital in the *sci. fa.*, they are liable if the Defendant should not pay or render himself. But he is privileged from such render by section 75, and I think that the Plaintiff, who is deprived of his direct remedy against the person of the Defendant, cannot obtain an analogous remedy indirectly through the bail. Sections 167 and 173 are not, as it seems to me, material, for the question is one of privilege, not of discharge. Whether the Defendant, if in custody, would be entitled to an immediate and unconditional discharge (see Manning *v.* Partridge, 14 East, 599) under section 76, is one point. Whether the Defendant, not being in custody, can be placed in custody by the bail is another. To fix the bail after the insolvency would be very much like making them sureties for the debt. I have referred to Comyns (Bail, R. 5). But even if the matters now set up could be pleaded to the *sci. fa.*, I think it would cause needless expense to compel the bail to do so. And if I am wrong now, an appeal to the Supreme Court is still open to the Plaintiff. The existence of the *ca. sa.* is, in my opinion, no obstacle to entering an *exoneretur*. Let an *exoneretur* be entered.

Attorneys for the Plaintiff: *Thompson and Hellicar—agents for Foxton.*

Attorney for the Defendant: *W. E. Murphy.*

CASES

DETERMINED BY

THE SUPREME COURT

IN

THE YEAR 1876.

INSOLVENCY.

RE BUCHANAN AND CO.

Partnership—Insolvency.

B. being about to reside and carry on business in Brisbane, entered into an arrangement with T. and M. at Sydney, under which they agreed to forward to him consignments from Sydney for sale in Brisbane, B. to retain half the profits upon the sales for his own use. Goods were consigned to B. by T. and M. under this arrangement, and continued to be so consigned for about twelve months. During that time M. frequently assisted B. by advancing him sums of money for the purpose of carrying on the business in Brisbane. B. represented himself in Brisbane as resident partner in the firm of B. and T. and M., and although M. was aware of the representation, he took no steps to prevent or contradict it.

Held, that the above facts did not constitute a continuing partnership in the Brisbane business between B. and T. and M.

Statement.

The Attorney-General (S. W. Griffith), *Hely* with him, applied to the Court to annul an adjudication order made upon the petition of Buchanan adjudging himself and Robert Thorne and Robert Meiklejohn insolvent under the style and firm of "R. W. Buchanan and Co.," so far as the order related to Thorne and Meiklejohn.

FROM affidavits, it appeared that Buchanan, being about to reside and carry on business in Brisbane, entered into an arrangement with the Sydney firm of Thorne and Meiklejohn, under which they agreed to forward him consignments from Sydney to Brisbane to be sold by him in the latter place, and to allow him half the profits upon all goods sold by him for them under the arrangement. Goods were thereupon consigned to Buchanan by Thorne and Meiklejohn under the arrangement, and continued to be so consigned for about twelve months. During that time

INSOLVENCY. 1876. *Re* BUCHANAN AND CO. *July* 5. Statement.

Meiklejohn frequently assisted Buchanan by advancing him sums of money for the purpose of carrying on the business in Brisbane. Buchanan represented himself to his customers in Brisbane, as resident partner in the firm of Buchanan, Thorne, and Meiklejohn, and although Meiklejohn was aware of the representation, he took no steps to prevent or contradict it. At the expiration of about twelve months from the date of the first consignment by Thorne and Meiklejohn to Buchanan, Meiklejohn declined to make any further advances to Buchanan. Buchanan then became insolvent on his own petition, and procured Thorne and Meiklejohn to be adjudicated insolvent with him as partners in the firm of Buchanan and Co. by the order of adjudication concerning which the application was made.

Blake, Q.C., and *Harding* were for the Official Trustee of the insolvent estate.

The following cases were cited:—

Baird *v.* Planque 1 F. and F., 344; *Ex parte* Angerstein *re* Angerstein, L.R. 9 Ch., App. 489; *Ex parte* Powell, Br. Ch. 223; Peacock *v.* Peacock, 16 Ves 49; *Ex parte* Mathews, 3 Ves. 125; Spenser *v.* Billing, 3 Camp. 310; Gurney *v.* Evans, 3 H. and N. 121; Parker *v.* Barker, 1 B. and B. 9.

Judgment.

COCKLE, C.J.:—The burden of proof was on Thorne and Meiklejohn; but in weighing the evidence, the fact that they had to prove a negative is material Slight proof would shift the presumption resting solely on an affidavit used *ex parte*, without notice to them. The order does not contain words limiting the adjudication so as to make it expressly against the partnership; and I give no opinion either as to the form of the adjudication or its effect upon the several personalty of Thorne or Meiklejohn within or without this colony. The question is, not whether, through rashness, negligence, or design, Meiklejohn has rendered Thorne and himself liable to third persons, by holding himself out as a partner of Buchanan. The question is, whether Buchanan was a partner of Thorne and Meiklejohn, or of one of them, at the time of the insolvency. Buchanan's own affidavit, even if uncontradicted, would scarcely lead me to infer that there was a partnership. It seems to me, at least, as possible that Buchanan was an agent, the amount of whose remu-

neration was determined by the profits. Going halves does not necessarily imply partnership. There is a contradiction rather than a corroboration of Buchanan. The fact that Meiklejohn was regarded by customers in the Edward-street store as a partner in the firm of Buchanan and Co. ought not to have made Buchanan regard himself as a partner in the firm of Thorne and Meiklejohn. The strongest passage relied upon in the letters put in evidence is quite consistent with the supposition that Buchanan was a mere agent, or at most, a joint adventurer in a number of isolated transactions. Even if a partnership could be said to have existed in each adventure, there was none existing at the time of the insolvency. The ordinary course of business wherein consignments were made from Brisbane to Sydney would seem, according to Kelly, to have been a very limited one. If Kelly be wrong, one would think that the books of Buchanan would throw light on the subject. The books have not been produced. I notice that in Buchanan's affidavit of the 20th March, not even the month of the visit of himself and Meiklejohn to Sadleir is mentioned. Without going into the evidence in contradiction, I remark that the slight corroboration afforded by admissions to third parties, and the silence of Meiklejohn when Buchanan styled himself a resident partner, does not, in my view, materially affect the question. I do not impute mendacity to Buchanan, but I say that if, under the circumstances which he has mentioned, he believed himself to be a partner at the time of the insolvency, then he drew large inferences from small premises, and I cannot follow him. As to Thorne, I could hardly at any time have had any serious question; but on looking carefully into the evidence, or such portions as I thought it necessary to go into, I see that there is as little case as against Meiklejohn. I think, therefore, that both these insolvencies must be annulled, and in each case with costs to come out of the estate.

Attorney for the Applicants: *W. H. Wilson.*

Attorney for the Official Trustee: *Graham Hart.*

INSOLVENCY. 1876. Re J. & G. HARRIS. Oct. 18.

RE J. AND G. HARRIS.

Examination of witnesses in Insolvency proceedings—Exclusion of interested party.

In proceedings in Insolvency, a party interested in them ought not to be excluded by the Court from hearing the examination of witnesses ordered to attend and give evidence respecting the estate and property of the Insolvent.

Statement. RULE calling upon a Police Magistrate and the Trustee of the insolvent estate to show cause why certain of the proceedings in the insolvency should not be quashed, on the ground that the insolvent G. Harris was excluded from the Court by the order of the Police Magistrate during the examination before him of witnesses ordered to attend and give evidence respecting the estate and property of the Insolvents.

Hely showed cause.

The Attorney-General and *Harding* argued in support of the rule.

The following cases were cited:—

Ex parte Farr, 9 Ves., 513; *ex parte* Jones, 17 Ves., 379; *ex parte* Parsons, 1 Atkyn, 204; Constance *v.* Brain, 2 Jurist, N. S., 1145 Ex.

Judgment. LILLEY, J.:—I have looked at the cases cited from Vesey and Atkin, but they do not appear to me in any way to affect the question now before me. In the first case, *ex parte* Farr, the Lord Chancellor refused to interfere with the discretion of the Commissioner; and in another case, the witness appears to have been protected from the question by the then state of the law. The Commissioners of Bankrupts at that time had a discretion which they exercised subject to an action by the bankrupt, or any person aggrieved or wronged. So that those cases do not appear to me to have the least application to the case before me, which is a very plain one:—Whether a person who is certainly in the position of a party having an interest in the proceedings, but who happens also to have been made a witness, can, under our Insolvency Act, be excluded by the examining court from being present during the examination of witnesses ordered to attend to give evidence respecting dealings, transactions, and property of the insolvents. I think, also, that the cases cited as to the practice upon the trial of actions before a Judge at *nisi prius*, have no relation to the matter at all. The practice of this

Court, though, even upon a trial at *nisi prius*, has been to refuse to exclude a party to the action during the examination of witnesses upon the trial. It is not necessary for me to decide to-day whether a Judge at *nisi prius* has power to exclude either party from the Court. I am inclined to think myself that he has such power, but under very exceptional and extraordinary circumstances, such as would not interfere with the due course of the law. At all events, he might order a party out of Court, but he probably could not refuse to permit his evidence to be taken, notwithstanding that order was not complied with. But it is not necessary to determine that to-day. If he refused to leave the Court, it would be a contempt of Court, for which he might possibly be punished. But we have here a statute under which, as I say, the insolvent is a party to the proceedings before the examining Court. Upon a subsequent application for his certificate, the evidence taken may be used (R. *v.* Smith, Russ. and Ry., 339, S.C.; 2 Stark, N.P., 208; and see R. *v.* Beeston Dears, C.C. 405, *per* Alderson, B.), and it may be the means of depriving him of his certificate, and excluding him from trading again within the colony. Therefore, it is something more than a civil proceeding, having attached to it the probability of penal consequences if the certificate should be refused. Then under section 216, this being an examination of the insolvents as well as of witnesses, there is a possibility that upon the death of any one of these witnesses the evidence might be afterwards tendered against George Harris upon a criminal proceeding—assuming that such a proceeding should be instituted,—for you know we have to consider such possibilities. It seems to me, therefore, that he stands, first in the position of a party, and secondly, in the position of a person who might, upon a criminal proceeding, have some portion of that evidence tendered against him. I think, therefore, he had a right to be present, and that the Police Magistrate who was conducting the examination was in error in insisting upon his exclusion from the Court. It appears to me that Mr. Harris and his counsel did all they could to entitle him to remain in Court; and notwithstanding the case of Constance *v.* Brain, which merely decided that it was not a ground for a new trial, and related merely to a trial at *nisi prius*—notwithstanding that case, I think that in this case all was done by Mr. Harris' counsel that could possibly be done to maintain his right to be present. Under these circumstances,

INSOLVENCY. 1876. *Re* J. & G. HARRIS. *Oct.* 18. Judgment.

I think the examination ought to be quashed. Whatever information it contains may be of use to the trustee, but it seems to me it was taken under such circumstances as should certainly exclude its being used in any proceeding against George Harris; and as I do not think I can order that a proceeding which is bad as against one party should be good as against another, it must be quashed wholly, and not in part.

Examination quashed accordingly; costs of George Harris and the Police Magistrate to be paid out of the estate.

Attorneys for G. Harris: *Lyons and Chambers.*

Attorney for Police Magistrate and Trustee: *P. Macpherson*

CRIMINAL CASES

DETERMINED IN

THE SUPREME COURT

IN

THE YEAR 1876.

(39 VICTORIA AND 40 VICTORIA.)

THE QUEEN *v.* KING.

CRIM. LAW. 1876. REGINA v KING. Feb. 14.

Evidence—Examination of Insolvent—Answers tending to criminate—38 Vict., No. 5, secs. 43, 115, 207.—Petition in Insolvency.

An Insolvent was indicted for a felony under sec. 207 of *The Insolvency Act of* 1874. At the trial, a statement of the prisoner upon his examination under sec 1 4 of the Act containing answers tending to cr minate him of the fel ny with which he was charged, was tendered in evidence.

Held that sec. 115 of the Act does not operate so as to render unlawful questions put to a person under examination under sec. 114, which tend to criminate him of a felony; and that if the person examined be afterwards tried on a criminal charge, his answers to such questions may be given in evidence against him.

Held, also, that it is not necessary that a petition for adjudication of insolvency under section 43 of *The Insolvency Act of* 1874 should be supported by affidavit.

CASE stated by LUTWYCHE, J.

Statement.

The prisoner was indicted at the Criminal Sittings of the Supreme Court held at Brisbane, November 30th, 1875, for that he, within four months next before the presentation at Brisbane of a petition praying for adjudication of insolvency against himself, attempted to quit the colony of Queensland, and to take with him a part of his property to the amount of £20 and upwards with intent to defraud his creditors.

At the trial, two petitions for adjudication filed on the 29th September, 1875, and the 24th September, 1875, respectively, and signed, the former by the prisoner and William Redmond, and the latter by the prisoner, and both duly attested, were tendered in evidence. Orders of adjudication made thereon by His Honour Mr. Justice Lilley and His Honour the Chief Justice respectively, were also tendered. It was proved that neither petition had been accompanied by an affidavit.

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Feb. 14.

Statement.

The prisoner's counsel objected to the reception in evidence of each of the orders, on the ground that the petition on which it was based was not supported by affidavit.

The learned Judge admitted the orders.

It was proved that in the course of an examination held before His Honour Mr. Justice Lilley in the insolvent estate of "King and Redmond," the prisoner was examined upon oath as a witness, and that his evidence was reduced to writing and signed by the prisoner. It was proved also that the prisoner did not object to answer any of the questions put to him. The statement of the prisoner as reduced into writing was tendered in evidence, and the following passages were objected to by the prisoner's counsel:—"When I took the passage, and when I was on board the 'Blackall,' I had the money as I have described in my coat."

"The money I had in my coat when arrested was not going there."

The learned Judge overruled the objection, and admitted the whole of the statement.

The question for the decision of the Court was whether the evidence which was objected to by the prisoner's counsel was properly admitted.

Blake, Q.C. (*Real* with him), for the prisoner.

The Attorney-General (*S. W. Griffith*), *Beor* with him, for the prosecution.

Judgment.

COCKLE, C.J.:—In this case, the prisoner was indicted for a felony under section 207 of the Act, and an adjudication was offered in evidence and objected to on the grounds that the petition was not supported by affidavit. The petition was a debtor's petition, which, under section 43 of the Act, may serve as the basis of an adjudication upon due proof, which does not, as I understand the Act, mean necessarily proof by affidavit. The Court may be satisfied by other matter—by attestation, for instance. It has been said that under the 38th rule, it is necessary that there should be an affidavit; but that rule does not, it seems to me, apply where there has been a provision made in the Act itself for proceedings on petition, or even if it did apply, it would possibly be competent for the Judge exercising the discretion given him by the rule to be satisfied without such proof;

and moreover section 70 of *The Insolvency Act*, by providing that the *Gazette* shall be conclusive evidence of the adjudication, seems to show the inclination of the Legislature to destroy any such objection as that made to the admissibility of the adjudication. I think, therefore, there is nothing whatever in this point, and I now proceed to the objection raised under section 115 of the Act. Now, as far as I am concerned, I have the greatest difficulty in assigning any meaning to this section, or to conjecture what could have been its purpose. Interpreted it cannot be by the marginal note; but even between section and note there seems to be a conflict. For the margination treats the Legislature as referring to answers and to the nature of answers, whether criminating or not, while at the first glance the section seems to refer to questions, and provides that certain questions shall not be unlawful, and by implication that certain other questions are to be. "No question put to any insolvent upon any examination under this Act shall be deemed to be unlawful," are words which at first sight would seem to imply that the Legislature had misconceived the Common Law, and supposed that any such question, unless it be put to an insolvent actually upon his trial, and put judicially by the Judge from the Bench, would be unlawful. As I understand it, the Common Law is not that such a question cannot be put, but simply that the person may refuse to answer. Assuming for a moment—which I do not assume, and, in fact, I think the assumption ought not to be hastily indulged in—that this clause is based upon misconception of the Common Law, I think it would be extremely dangerous for us to travel into the regions of conjecture, as we should were we to pronounce on the effect of that misconception. It has been contended here that the omission of the words "or felonies" at the end of the section shows an intention on the part of the Legislature that questions which in respect to misdemeanors would not be unlawful would be in respect to felonies. It is a possible interpretation to put on the Act, but it is not perfectly clear to me why a contrast is to be drawn between misdemeanors and felonies at Common Law and those under other Acts. It is more probable that the words should have been omitted, but it is equally probable that it was intended to draw a distinction. It would be very unsafe indeed to base a judgment upon conjecture. I prefer, therefore, one of two other interpretations, namely — in

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using this phrase, the Legislature merely meant that the question need not be answered, not to deprive the Judges or parties of the opportunities of discovery offered by putting the question, but simply that an unlawful question need not be answered. That, certainly, would seem to be the view taken by the Legislature in the 22nd section of 7 Vic., No. 19, which Mr. Justice Sheppard has kindly furnished us with, and which, after reciting that "if any insolvent shall refuse to answer any lawful question," goes on to enact that "After the passing of this Act no question shall be deemed unlawful by reason only that the answer might criminate him." Thus fortified with the expression of the New South Wales Legislature, of which this colony then formed a part, I see less difficulty in coming to the conclusion that no question shall be deemed unlawful by reason only that the answer may expose him to punishment, has reference to the old state of the law, and by "unlawful," the Legislature meant questions to which an answer might be refused. If that be the interpretation, of course this conviction must be affirmed, because it is expressly stated on the face of the case that the prisoner did not object to answer the questions put to him. I may add that it has occurred to me that another interpretation may be put on these words, that they may have crept into the clause this way—that the Legislature had intended to enact that certain questions should be unlawful, they might have intended that a question intending to convict of these felonies should not be lawful. If that be so, certainly there is no express enactment in the Act that any particular question shall be unlawful, and if the Legislature have carried out that part of their intention, it is only by implication so remote that it would not be safe to base any arguments upon it.

The conviction will have to be affirmed.

LUTWYCHE, J.:—I also think the conviction ought to be affirmed. It appears to me that there is no weight in one point which was argued at the bar on Friday last. I think the orders of adjudication in both cases, in respect of King and Redmond, and in respect of Redmond, were both good, although the petitions were not verified by affidavit. Rule 38 appears to me to apply to motions only, and the absence of the word "affidavit," when the words "due proof" are used in the 43rd section, leads me to the conclusion that it was not intended to require an affidavit in the case of a debtor's petition, while in the 52nd section

we have an express provision that the creditor's petition—then being under the notice of the Legislature—that the petition of the creditor shall be verified by the oath of the petitioner.

Then with regard to the second and more important point raised by the language of the 115th section of the Act, I agree with the Chief Justice in thinking that the words "unlawful question" mean a question that need not be answered; and and that being so, if the question is put, and the insolvent decline to answer it, and is nevertheless compelled to answer, I take it that in a prosecution for felony founded upon evidence thus extorted from him, he might possibly successfully object, if the question did not relate to his dealings and property. I think it would be extremely dangerous to hold that the law which was formerly in force, and which is still in force, with regard to the answers given by an insolvent, tending to criminate himself, when his dealings or property are in question, should be so altered by implication as to make it unlawful to put a question which might expose the insolvent to a charge of felony. Mr. Justice Cresswell, in a case that came before him in the Common Pleas (Wansey *v.* Perkins, 7 Manning and Granger, 142), said —"It was a safe rule, in construing Acts of Parliament, to look at the words of the Act, and construe them in the ordinary meaning, unless such a construction would lead to some manifest absurdity or injustice." Now, when words are plain, and their construction is easy, by applying the ordinary sense of the words to them, that should be done; yet if the result should be a manifest absurdity or injustice, courts are then in a manner compelled to give them a different construction. Surely, if by implication we are asked to do something which would lead to both, we ought to be very cautious how we adopt such a construction. And it seems to me that it would be manifestly absurd and unjust if we were to hold that a person might be compelled to give an answer that would expose him to a prosecution for a misdemeanor under this Act, while he was protected from giving an answer which would subject him to a prosecution for a graver offence. It would be holding out a sort of premium to criminals to sin as much as they could, and such a construction would certainly be unjust to the men who are found to have committed acts which in the eye of the law are of lesser magnitude. After all, the distinction is, perhaps, more technical than substantial, for the two felonies which are men-

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tioned in this Act seem to me to be substantially no more contrary to morality and the aims of public justice than many other acts which are enumerated as acts of misdemeanor only. On the whole, I think, without striving to point out the particular object which the Legislature had in view, which it is not very easy to discern, I think we shall, as far as we can judge, carry out the intention of the Legislature by confining the operation of the section to the words which appear in it.

LILLEY, J.:—Upon the first point raised, that the adjudication was in effect bad, because the petition had not been supported or proved by affidavit, I have come to the same conclusion as the Chief Justice and Mr. Justice Lutwyche. The language of the section is, that the adjudication shall be upon due proof, and the Judge, who is the Court sitting to make the adjudication, is to exercise a judicial function, and it is for him to decide whether the evidence amounts to due proof, or to that sufficient degree of proof, which would enable him to make the adjudication. Now, I suppose that there can be no stronger proof than a man's own admission that he is unable to meet his engagements and liable to the *Insolvency Act.*

But then it is said that the judgment of the Judge is to be measured by rule 38, that the rule prescribes that the proof shall be an affidavit. But when we look to the language of that rule, it is very doubtful, in the face of section 33, which requires an adjudication against a debtor to be made upon petition, it is very doubtful whether the rule applies at all. But then, if we admit that the rule does apply, is it not in itself a sufficient answer to the objection? Because there, "All applications to the Court in the exercise of its primary jurisdiction by virtue of the Act, shall (unless herein or in the Act otherwise provided, or the Court shall in any particular case otherwise permit) be by way of motion supported by affidavit."

Well, now, if the Judge is satisfied and makes the adjudication upon a petition without affidavit, it is the strongest proof that he has permitted proof of another kind to be used—at all events, due or sufficient proof. Upon that point, therefore, I think the prisoner can have no advantage from the objection.

Then I come to the graver objection founded on the 115th section, which states that "No question put to any insolvent on any examination under this Act shall be deemed unlawful by

reason only that the answer thereto may expose him to punishment in respect of some one or more acts or things by this Act made punishable as misdemeanors." I do not understand the members of the Court who have delivered judgment before me to decide that this is an implied enactment, that any question put to an insolvent in his examination before an examining Court, which would tend to prove that he had been guilty of felony, would be unlawful, or that the insolvent could refuse to answer it. I do not understand the members of the Court to have gone so far, and I think, that whether the question tended to show that the insolvent had been guilty of felony or misdemeanor, he is bound under this statute to answer, and the evidence can be used against him either for felony or misdemeanor. In considering this 115th section, we must have regard to the state of the law before the enactment, or, rather, to the effects of the other portions of the statute. We must take it to be clear law since the "Queen *v.* Scott," which has been sanctioned by our highest Court of Appeal—the Privy Council—that where a statute requires an insolvent to answer questions touching his trade dealings and property, he must answer, even though the answer expose him to a prosecution for felony. There were two rules existing at the time this enactment was passed. The first was the maxim "that no man should be held to accuse himself," and "that he should not be bound to answer any question to criminate himself." When the statute required him to answer touching his trade and dealings, it removed that privilege. Then the effect of the case of the Queen *v.* Scott was, not to go further, to hold that the rule of the law of evidence was also repealed, namely, that when a man has given his answer it may be used in evidence against him. On the contrary, the effect of the case is this:—If the answer is given by the force of the statute, by the legal obligation on the man, it shall be received in evidence against him, unless the statute has itself some express enactment to the contrary. Therefore, when the statute compelled him to answer, it compelled him to answer at his peril. If the Legislature had intended that he should have any protection, it would have enacted it. But Mr. Blake argued with great force that the 115th section, when it enacted that "No question put to any insolvent on any examination under this Act shall be deemed unlawful by reason only that the answer thereto may expose him to pun-

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ishment in respect of some one or more acts or things by this Act made punishable as misdemeanors," impliedly enacted that it should be unlawful to ask him any question which would expose him to a prosecution for felony. I am unable myself, I confess, to give such effect to the plain language of the 115th section. I cannot suppose it was based upon misconception of the common law. I rather prefer to limit it to the extent I shall indicate, to taking the interpretation of the learned Chief Justice, that a man may refuse to answer;—that may possibly explain it. In all probability, that was present to the minds of the Legislature. Whatever conception you attempt to fix of this section, it is by no means satisfactory. It has, no doubt, produced considerable doubt in the interpretation of the statute, but it may be that in creating a long series of new misdemeanors (I think there are twenty-four), entirely the creatures of this statute, that the Legislature thought it would be better to make this enactment; that although a man might be exposed to a prosecution for misdemeanor under the statute, he shall not refuse to answer. That may have been present to the minds of the Legislature. It is difficult at any time to say what is the actual intention of the Legislature, and all we are bound to do is to gather the construction from the instruments submitted to our judgment. Well, then, we know that the law leans strongly against implied repeals. If there is another rational interpretation to avoid that, it must be put upon it. If that be so, the principle holds more strongly against implied enactments, because in the absence of that express enactment the question itself is not unlawful by the common law; if we take the literal reason of the section, it would make any question with that view, or having that tendency, unlawful. It would be an extension of the common law by implied enactment, because at common law the question was not unlawful, nor the answer. But the protection he had was this, that if it tended to criminate him, he was not bound to answer it. But that protection seems to have been removed. Therefore I think the conviction must be affirmed.

SHEPPARD, J.:—With regard to the first point, I am of opinion that on a debtor's petition to be adjudicated an insolvent, it is not necessary that the petition should be supported by affidavit. Under the 43rd section, it is on the "presentation of the petition and on due proof of presentation," the debtor can be made an insolvent on a petition containing an allegation of his

inability to meet his creditors, and that is one of the acts of insolvency set out under the 44th section. Where the proceedings are adverse, where it is a creditor's suit, it is necessary that there should be an affidavit verifying the petition; and where in the later section liquidation by arrangement, which is a non-contentious suit, and the debtor has to file a petition, he also has under the rules to make an affidavit, and on reference to form No. 89, he does not swear to the fact of his being unable to pay his debts, but simply makes an affidavit as to the most convenient place for his creditors to meet. Therefore, the principle of the Act is, that in contentious suits, the application for adjudication must be supported by affidavit, and in non-contentious cases it need not. I do not apprehend that rule 38 applies, that speaks of motions, and although the learned counsel informed the Court of a similarity between petitions and summonses in the Court of Chancery, I apprehend it has no application, because under the rules petitions are excluded, and even if it did apply, there is authority for holding that the Act of the Legislature must prevail over the rules. Lord Chief Justice James says:—"The Act of Parliament is framed, and the rule must be interpreted by it, and that rules must give way to the plain terms of the Act." Here the plain terms of the Act are, that on an application for adjudication, the petition is to be filed, and on proof of that, which would be furnished by the endorsement of the Registrar on the petition, adjudication is made. Therefore, I think that point must fail.

With regard to the other question, no doubt it is a matter of very great difficulty, and I would refer to the previous Acts of Council and of the Legislature, which deal with the examination of insolvents, and what questions they were bound to answer, and what they were permitted to refuse to answer. Under the old *Insolvency Act* of the Colony of New South Wales, 5 Vic., No. 17, the insolvent was compelled to answer all questions that tended to the discovery of his property or estate, and there was no privilege allowed him. That does not appear to have been a satisfactory state of the law, and it was altered by the 7 Vic., No. 19. By the 22nd section, it is enacted "That if any insolvent under examination before the Court or Commissioner shall refuse to answer any lawful question put to him, he may be committed to prison until he shall submit to make such answer Be it enacted that after the passing of this Act no

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question put to an insolvent on any such occasion shall be deemed unlawful by reason only that the answer thereto may expose him to punishment under this Act Provided that no such examination or any answer thereto shall be admissible in evidence against such insolvent (other than on a prosecution against him for perjury) except for the purposes of this Act only." Then 19 Vic. says, "Provided however that no examination or answer of the person charged with any indictable offence under the provisions of the Insolvent Acts in force for the time being shall be admissible in evidence against him on the trial of any indictment other than a prosecution against him for perjury." So that before *The Insolvency Act of* 1864, the law was, that an insolvent should give full discovery, but that his answer could not be used against him on the trial of any other indictment other than perjury. The Act of 1864 was drawn from the English Act passed in the 12th and 13th Vic., and that also enacted that full discovery should be made, and it was held to take away from the insolvent the right to object to any question, although the answer might tend to convict him. That was the law down to Regina *v.* Scott. But it seems to me it must be remembered that that was a decision the correctness of which was very much canvassed. It is disapproved by Mr. Greaves in his "Russell on Crimes," and was dissented from by one of the Judges forming the Court, and it was strongly disapproved of by Sir Fitzroy Kelly in a late case, and also to a certain extent by Sir A. Cockburn. So that although the law had been settled in that way, there had been all these discussions on the matter. Then the Act of 1874 begins, and it is necessary to ascertain what the Legislature intended by the words used in that Act, and it must be remembered that they were dealing with the necessity of having a full discovery of the insolvent's property and estate, and also that there was a maxim of the common law that a man should not be compelled to accuse himself. That being the state of the case, the 114th, 115th, and 116th sections of the Act are passed. Section 114 is for the purpose of bringing the insolvent before the Court and for the discovery of documents. Then, before enacting to what extent the insolvent is to be examined, the 115th section is put in:—"No question put to any insolvent on any examination under this Act shall be deemed unlawful by reason only that the answer thereto may expose him to punishment in respect of some one or more acts or things by this Act made punishable as misdemean-

ors." The 116th section gives the right to the Court to examine the insolvent. It seems to me impossible to hold that the Legislature, under the 115th section, did not intend to draw a distinction between misdemeanors and felonies, and that when they say that no question put to the insolvent shall be deemed unlawful by reason only tha the answer thereto may expose him to punishment in respect of some one or more acts or things by this Act made punishable as misdemeanors, it seems to me that they must have intended to take into consideration the doubt there was in the law before, that in cases of felony he should not be compelled to accuse himself. But I do not think that it means that the question itself is to be unlawful, that is to say, that the Judge is to interfere and say that a question which may relate to the discovery of the dealings of the insolvent, and may also lead to a prosecution for felony, that he is to say, "I cannot allow that question to be put." An unlawful question, in the ordinary sense of the term, is one that the Judge says cannot be put in law. So that in my opinion the result is, that when a question is put to an insolvent which in some way may expose him to the punishment for felony, and which may be given in evidence against him on a charge of felony under the Act, that he has the right to demur to the question and refuse to answer it. In this case the objection was not made, and inasmuch as the objection was not made, the case of Regina *v.* Sloggett is an authority, and, therefore, the question having been answered without objection, it appears to me that it was properly received, and, consequently, the conviction must be affirmed.

Conviction affirmed.

Attorney for Prisoner: *A. J. Thynne.*

Attorney for Prosecution: *The Crown Solicitor* (*Robert Little*).

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April 28.

THE QUEEN *V.* DODWELL.

Misapplication of Moneys by Public Servant—38 *Vict.*, *No.* 12, *sec.* 49.

It is not necessary to the conviction of a Public Servant for misapplying moneys that have come into his possession for or on account of the Consolidated Revenue, that it should have been his duty to receive the moneys, or that the Government should have had any further claim or title to the moneys beyond the right to deal in account with them.

CASE stated by the Deputy Judge of the Western District Court.

Statement.

G. W. Dodwell was tried before me at the last sittings of the Western District Court, holden at Warwick on the 26th of October, A.D. 1875, under the 49th section of *The Audit Act*, for that he, being in the Public Service, did misapply certain moneys which had come into his possession on account of the Consolidated Revenue.

The evidence adduced before me as Deputy Judge in the trial, so far as relates to the question I have to submit to the Court of Criminal Appeal, was as follows:—

In June, 1875, prisoner held the situation of Clerk of Petty Sessions at Warwick, and on the 29th of that month, E. B. Douyere, a publican residing in that town, saw the prisoner, asked him to forward her publican's license fee to the Treasury, and for that purpose handed to him the sum of £30 in bank notes, which prisoner received from her, and for which he gave her a receipt, which was produced and put in evidence at the trial. Prisoner was to get a bank draft for the above amount, and send it down to the Treasury for her, she at the same time handing him the price of the draft.

Douyere never got that money nor any part thereof back from the prisoner.

F. O. Darvall was then called, and proved that he was Revenue Clerk in the Treasury; that it was his duty to receive all Government moneys on account of the Consolidated Revenue; that the prisoner had been in the habit of sending money down to the Treasury for publicans' licenses; that he (prisoner) was not bound to receive general license fees, but if he did receive them he should forward them to the Treasury immediately; that he (witness) had never received any credit for the license fee of Mrs. E. B. Douyere; that no person was appointed to receive license fees—they are bound to be paid into the Trea-

sury; that Mrs. Douyere's had not been paid into the Treasury; that it could not have been paid in without his knowledge, and that it still remained unpaid.

April 28.

Statement.

Edward Boyd Cullen, Chief Clerk in the Treasury, proved that it was his duty to open all letters addressed to the Under Secretary of the Treasury, and should there be any remittances therein, to hand them to the Revenue Clerk; that he (witness) knew prisoner, and that he never received a remittance from him on account of Mrs. E. B. Douyere.

At the conclusion of the case for the prosecution, prisoner's counsel objected that there was no case to go to the Jury, as there was no evidence to show that the money received by prisoner was received on account of the Consolidated Revenue of the Colony.

I overruled the objection, and left the case to the Jury, who found the prisoner guilty. I passed judgment on him, and he is now in gaol.

Upon the application of counsel for the prisoner, I consented to reserve for the opinion of the Court the questions —

> "Whether, upon the facts stated, I was right in leaving the case to the Jury, and whether the prisoner was properly convicted?"

Real, for the Prisoner, cited R. *v.* Beaumont, D.C.C. 270; R. *v.* Thorpe, D. and B., 562.

The Attorney-General (*S. W. Griffith*) for the Crown.

Judgment.

COCKLE, C.J.:—In this case, the question reserved for our decision is—"Whether, upon the facts stated, there was a case for the Jury?" Now, the prisoner was charged for that he being in the Public Service, did misapply certain moneys which had come into his possession on account of the Consolidated Revenue. Now, money did come into his possession—on what account? It was his duty to receive all Government moneys on account of the Consolidated Revenue. He had been in the habit of sending money down to the Treasury for publicans' licenses, although not actually bound to receive general license fees. Then, according to his own statement in the receipt, the money was "received on account of the Public Service of Queensland for a publican's license." Accompanying that with the fact that it was his duty to receive money on

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account of the Consolidated Revenue, I apprehend that the inference is that this money came into his possession on account of the Consolidated Revenue. It is possible—though that probably would depend upon whether or not a certificate from the Bench had been lodged at the Treasury, or whether or not other proceedings had taken place at the Treasury—it may be presumed that under certain circumstances Mrs. Douyere could have countermanded the purpose for which the money was lodged. There is no evidence whatever that she did so; and as against all the world, except Mrs Douyere, and possibly even as against her, the authorities at the Treasury had the right to the possession of this money. That being so, I think all the facts necessary to sustain the information under the 49th section of *The Audit Act* seem to have existed, and, at all events to have been found by the Jury; and, consequently, that the conviction must be affirmed.

LUTWYCHE, J.:—The sole point reserved for the consideration of the Court in this case is:—"Whether, upon the facts stated, I was right in leaving the case to the Jury, and whether the prisoner was properly convicted?" Well, I think upon the facts stated, that the learned Judge was quite right in leaving the case to the Jury, and that the prisoner was properly convicted. The propriety of the conviction rests upon circumstances which have just been stated by the Chief Justice, and upon the fact which seems to me to have been perfectly established, that the money was received on account of the Consolidated Revenue. The Act, which appears to have been very carefully framed, and especially this section of it, seems to have been intended to prevent persons in the Public Service, who received public money, from appropriating it to their own use, whether it is their duty to receive the money or not. It may be part of their duty to receive money for the particular purpose for which it is lodged in their hands, but on the other hand it may not; but the section applies to all persons in the Public Service who obtain possession or control of moneys on account of the Consolidated Revenue. Then, if any person in the Public Service receives money to be applied to the Public Service, and therefore forms necessarily a part of the Consolidated Revenue when it reaches the Treasury, he, under the terms of this section, appears to be subject to the penalty contained in it. Now, it is quite clear that Dodwell was in the Public Service; he was Clerk of Petty Sessions at

Warwick; the money came into his possession from Mrs. Douyere, and it was her money, in my opinion, until it reached the Treasury. It is not necessary, however, to state whose property the money was; it is sufficient that it shall be shown that it is money, and that it came into the possession of a Public Servant for and on account of the Consolidated Revenue. That appears to me to have been perfectly established, and, therefore, I think that this conviction was perfectly right, and ought to be affirmed.

LILLEY, J.:—I have but very few words to add to the judgments already delivered. It seems to me that the plain meaning of the section is, that if anyone being in the Public Service receives money with which the Government would have a right to deal in account in any way, although it might not ultimately be entitled to keep the money, if a person receives money under these circumstances and misapplies it, he is guilty of the offence. I think the main question is—"Was he in the Public Service, and did he receive the money on account of the Consolidated Revenue?" or, in other words, "Did he receive money with which the Government had a right to deal or to have the immediate possession?"—and that appears to me to be the whole meaning of the Act. In this case, the facts are clear enough—he received the money on account of the Public Service, and that fact being left to the Jury, they have found that it was received on account of the Consolidated Revenue. It seems clear that Mrs. Douyere paid her money in order to obtain some license which had been already granted under *The Publicans Act*. The Government, therefore, had a clear right to deal with the money, and whether they might deal with it in the way of retaining it and granting the license, or in refusing to issue the license and returning the money to her, was a matter with which the prisoner had nothing to do. I think, therefore, that the conviction must be affirmed.

SHEPPARD, J.:—The prisoner in this case is indicted under the 49th section of *The Audit Act* for misapplying certain moneys which had come into his possession on account of the Consolidated Revenue, he being a person employed in the Public Service. It appears to me that it is necessary to establish that the money which is received by a public officer is money which by the receipt becomes either the special or the general property of the Government. That is analogous to embezzlement, and it

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is clear, that although since the alteration of the law it is not necessary to show that the money is received by the servant in virtue of his employment, still it is necessary to establish that the money received is the property of the master; that is to say, that he has either a special or a general property in that money. There is a late authority for that in the Queen *v.* Cullen (L.R. 2, C.C.R. 28). Here it appears to me the question is—Whether, when the prisoner being in the Public Service received this money, the Government—the Crown—had a special or general property in it; that is to say, supposing some other officer of the Government had come to the Clerk of Petty Sessions directly this money was received, and said, "Now, hand this money over to me." If he had the right to do that, it appears to me that the Crown had a special property in the money. It might turn out afterwards that if the license fee had been paid by the agent of Mrs. Douyere in Brisbane, the money would have to be returned, but if they had a special property in the money, then the prisoner was, it seems to me, properly convicted. Now, there were two states of circumstances laid before the Jury—one, the case argued by the learned counsel for the prisoner yesterday, where it appeared that the money was paid to the prisoner for the purpose, and for the purpose only, of getting a draft, and sending that draft down to the Treasury. It appears now, from the receipt, that he acknowledges not to have received it on behalf of Mrs. Douyere, but on behalf of the Public Service. The obtaining the draft was merely the course of transmitting the money to the Treasury. It therefore seems that directly he received it on behalf of the Public Service, as stated in the receipt, that the officers of the Revenue had a right to its immediate possession, and having that right, they had that special property which it appears to me they must have, for it to form a portion and to be received on account of the Consolidated Revenue. These facts, whether he received it on behalf of Mrs. Douyere, or whether he received it on behalf of the Consolidated Revenue, were left to the Jury, and they have found that he received it on behalf of the revenue. I am therefore of opinion that the conviction must be affirmed.

Conviction affirmed.

Attorneys for the Prisoner: *Thompson and Hellicar.*

Attorney for the Crown: *The Crown Solicitor (Robert Little).*

END OF VOL. I.

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AGREEMENT— *Wrongful Dismissal— Condition Precedent.*] The Plaintiff and the Defendant entered into a written agreement by which the Plaintiff undertook to point out to the Defendant certain land open to be applied for under *The Pastoral Leases Act of* 1869, and the Defendant promised to pay the Plaintiff £700 in the event of the Defendant approving or occupying the land. The Plaintiff proceeded to the land, and incurred trouble and expense in making preparations which were necessary before pointing out the land. To an action by the Plaintiff against the Defendant for wrongfully discharging the Plaintiff from the performance of the agreement, the Defendant pleaded that he did not approve or occupy the land:—*Held*, that the plea was a good plea. BARRY *v.* SKUTHORPE 33

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CROWN LANDS ALIENATION ACT, 1868 *—Right to Deed of Grant of Selection— Specific Performance*—31 *Vict., No.* 46, *ss.* 46, 51, 53, 57.] The Plaintiff caused application to be made on his behalf for a lease of certain Crown lands under the provisions of the statute 31 Vict., 46, and at the same time caused to be deposited with the proper officer a declaration made by himself in the form required by the 53rd section of the Act. A lease for ten years, subject to the conditions prescribed by the Act, was granted to him, and he afterwards obtained from the Commissioner of the district a certificate under the 51st section of the Act, that the conditions had been duly performed. The Plaintiff then paid the balance of the ten years' rent, and applied to the Government for a deed of grant of the land under the 51st section of the Act. The Government not complying, he filed a Bill in the Supreme Court praying for a decree declaring him to be entitled to have a deed of grant in fee-simple of the lands issued to him:—*Held*,

C. L. A. ACT, 1868—*continued.*
that it rested with the Governor in Council to decide whether the Deed of Grant should issue or not, and that the Court could not enforce a grant before the Governor in Council had decided that it should issue:—*Held, also*, that the Act requires a residence in Queensland on the part of the applicant for a lease, beyond a mere temporary residence at the time of making his declaration. FISHER *v.* TULLY 1

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BY AUTHORITY: JAMES C. BEAL, GOVERNMENT PRINTER, BRISBANE.

THE

QUEENSLAND LAW REPORTS.

CASES

DECIDED IN

THE SUPREME COURT.

EDITED BY H. R. BEOR, BARRISTER-AT-LAW,

FOR THE

QUEENSLAND LAW SOCIETY.

THE JUDGMENTS REPORTED BY MR. W. H. OSBORNE.

VOL. I. PART II.

1877—40 AND 41 VICTORIA.

BRISBANE:

BY AUTHORITY: JAMES C. BEAL, GOVERNMENT PRINTER, WILLIAM STREET.

1880.

His Honour Sir JAMES COCKLE, Kt. ...	*Chief Justice.*
His Honour ALFRED JAMES PETER LUTWYCHE	*Judges of the Supreme Court.*
His Honour CHARLES LILLEY	
His Honour EDMUND SHEPPARD	
The Hon. S. W. GRIFFITH	*Attorney-General.*
ROBERT LITTLE	*Crown Solicitor.*

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CASES

DETERMINED BY

THE SUPREME COURT,

A.D. 1877.—40 AND 41 VICTORIA.

WOOD *v.* CORSER AND ANOTHER.

Practice—Injunction—Order.

A Judge's Minute of his Decision in favour of the issuing of an injunction is not a sufficient authority for its issue; if the usual order, founded upon the minute, is not taken out, the injunction will be liable to be dissolved for irregularity.

1877.

February 23.

Statement.

ON the 13th of January, 1877, the Court decided that the Plaintiff was entitled to an order to the effect that, upon payment into Court of the amount due on certain mortgages and a bill of sale, and on the Plaintiff undertaking to abide by any order which the Court might make as to damages to be paid to the Defendants by the Plaintiff, an injunction should issue forthwith to restrain the Defendants from selling certain real estate and ships.

The Attorney-General (*Harding* with him) moved that an injunction issued in the terms of the above decision might be dissolved, on the ground that no order for the injunction had been taken out.

Pring, Q.C., opposed the motion.

Judgment.

COCKLE, C.J.:—As this is an important matter, I think it right there should be no doubt as to what opinion I at least entertain upon the subject. I think that my minute was not an order, and was not, in itself, an authority to issue the injunction. A different view would be very inconvenient. The Judge, making a mere rough memorandum, might commit an error or make an omission. In that case it would be the duty of the professional gentlemen to point out the error, or to give the means of correcting the omission, so that the person affected may have not only the view of the Judge in the case, but the responsibility of the other side to properly carry out the Judge's view. The minute itself cannot be authority, because how could the officer of this Court know that the party in whose favour the order

1877.

WOOD v. CORSER AND ANOTHER.

February 23.

purported to be made liked the order—how, without some further act of the party, could he know that it was desired that such an order should be made? Then, what act is the proper act for the party to do to show the manner in which he wishes the order to be drawn up? Why, to draw it up, and present what he thinks to be his view of the Judge's minute, and have it passed and properly vindicated. I cannot for a moment let my opinion remain uncertain, and I think the objection is fatal, and dissolve the injunction.

Solicitors for the Plaintiff: *Roberts, Liddle, and Roberts.*

Solicitor for the Defendants: *P. Macpherson.*

1877.

Re HARRIS.

March 3.

Statement.

RE J. AND G. HARRIS, INSOLVENTS.

Insolvency—Practice—Certificate.

"*The Insolvency Act*, 1874," casts upon the Insolvent, applying for a certificate of discharge, the burden of proof that his insolvency arose from circumstances for which he cannot justly be held responsible.

Harding and *Garrick* applied for certificates of discharge to be granted to the insolvents, George Harris and John Harris.

Judgment.

LILLEY, J.:—I think that this Act *prima facie* discredits the Insolvent when he becomes insolvent; or, in other words, it calls upon him, when applying for his certificate, to show to the Court the causes of his insolvency, and to prove to the satisfaction of the Court that his insolvency has arisen from circumstances for which he cannot justly be held responsible, and I think there must be some substantive proof of that kind. I know that under the old Act, in the absence of opposition, the certificate used to be granted; and perhaps it would be convenient for the Court, in the absence of opposition, to assume that there is no cause for refusing it. Taking, however, the view of the statute I do, I must require something more. It is thrown upon the Insolvent as a duty, to satisfy the Court, by reasonable proof, that his insolvency has arisen from something he cannot be held responsible for. The Court would consider the absence of opposition in coming to a conclusion; and if, on looking at the proceedings, I think there is nothing against the Insolvent, all will be well; but if I cannot find what I require for my satisfaction, I will give you an opportunity of bringing further information, or of commenting upon that already in the case.

Solicitors for the Applicant, George Harris: *Lyons and Chambers.*

Solicitors for the Applicant, John Harris: *Hart and Flower.*

CUMMING *v.* RAMSAY.

Damages—Costs—31 Vic., No. 20, sec. 19.

1877.

The word "damages" in "*The Costs Act*" (31 Vic., No. 20, sec. 19), does not include all damages in the widest sense of the term, but applies only to costs.

CUMMING *v.* RAMSAY.

March 12.

The Plaintiff had sued forth a writ of *Ca. Re.* against the Defendant, and afterwards discontinued his suit.

Statement.

The *Attorney-General* applied, in Chambers, on behalf of the Defendant for his costs, damages, and charges sustained by him in consequence of the writ, including damages, according to the common acceptation of the word.

LILLEY, J.:—I have gone over this case with some care, and I have made very diligent search indeed for cases upon the 8th Eliz., chap. 2, sec. 2, and I find that so far as history can and ought to be—as it ought to be—called in aid in the interpretation of a section which is substantially the same as the ancient statute upon which it is founded, no case occurs in which it has been used for the purpose of recovering damages strictly as such. I have consulted the text books and the abridgments of Viner and Bacon and the digest of Comyn, and I think if any instance of the kind had occurred it would have been found there. On looking at this section and at the statute, I find it is included in our modern statute which relates exclusively to costs. I think that the correct reading of the section is, that costs, damages, and charges are three several words having very much the same signification.

Judgment.

The Attorney-General called upon the other side to show that in any case the word "damage" had signified costs. Well, there is a case in which the two have been held to be interchangeable; at all events, it has been held that costs are damages, and that, in fact, the word "costs" falls under the general name of damages. And I think in a statute of the kind it might well be that, in using the words "costs," "damages," and "charges," a more emphatic form of expression had been used for the small word "costs" alone. It might mean costs of increase, charges which were not strictly of the nature of costs, but which might be fairly included on taxation. But upon that I give no opinion: it is a question for the Registrar, subject to revision. I refer to the case of "Phillips *v.* Bacon" (9 Easter Term Reports at page 304). In that case the plaintiff had declared against the sheriff

1877.

CUMMING v. RAMSAY.

March 12.

Judgment.

for a wrong, and he had used the word "damages," and it was held that that included costs; and Lord Ellenborough, in delivering judgment, says:—

"But costs are a consequence by the statute of Gloucester of detaining the debt, and are part of the damage. In contemplation of law, the word 'damages' emphatically includes costs. It is so considered by Lord Coke, and in the various authorities which have been cited. Costs, therefore, properly fall under the *nomer generale* of damages."

Then Grose and Le Blanc, Justices, assented, and the latter observed:—

"That it was admitted that if the allegation had been general, that the 80s. were awarded to the plaintiff for his damages, that would have done. Then, what difference does it make when it is said for his damages sustained by occasion of the detaining the said debt; the costs being a consequence of such detention, and the law coupling them together under the general name of damages."

It might well be, therefore, that the author of this statute, in using the word "damages," only meant to say over again what he had said before in using the word "charges"—that he granted the defendant, under such circumstances, his costs.

I think, therefore, that this section is limited to costs, and that this summons must be dismissed with costs.

Attorneys for the Defendant: *Lyons and Chambers.*

Attorney for the Plaintiff: *P. Macpherson.*

1877.

PAUL v. BUTTENSHAW AND OTHERS.

Statement.

PAUL *v.* BUTTENSHAW AND OTHERS.

Prohibition—Police Magistrate—Hearing of Case—Illegal Employment of Polynesian Labourer—Evidence—Onus of Proof—31 *Vic., No.* 47, *ss.* 23, 24; 11 *and* 12 *Vic., c.* 43, *s.* 14.

Upon an information charging the Defendant with having employed a Polynesian labourer otherwise than under the Regulations of "*The Polynesian Labourers Act*, 1868," without reporting the same to the nearest bench of magistrates, it is for the prosecution to show that the report was not made.

A Police Magistrate, while engaged in hearing a case, left the bench in order to give evidence, when his place was taken by a justice of the peace. Upon the completion of his evidence the Police Magistrate returned to the Bench, and continued the hearing of the case, and made an order.

Held that the proceedings were irregular, the case not having been heard either by a police magistrate or by two justices of the peace, as directed by the Act.

RULE *nisi*, calling upon the Defendants to show cause why a writ of prohibition should not issue to restrain them from further proceeding upon an order made by the Defendant Buttenshaw, a police magistrate.

Statement.

The order was made upon an information laid against the Plaintiff, charging him with having employed a Polynesian labourer otherwise than under the Regulations of "*The Polynesian Labourers Act*, 1868," without reporting the same to the nearest bench of magistrates, and directed him to pay a penalty of £10 and costs. From the evidence taken before the Police Magistrate and affidavits, it appeared that a Polynesian labourer, entered in the books of the Polynesian Inspector of the district as under agreement to a firm in Maryborough, had been seen by him working on a plantation belonging to the Plaintiff, and that no transfer of the labourer from the firm to the Plaintiff had been made. The Plaintiff had made no report of his employment of the labourer to the bench of magistrates at Maryborough, but there was no evidence that that was the nearest bench of magistrates to the place where the labourer was employed. The Defendant Buttenshaw alone heard a part of the case as Police Magistrate, and then left the bench in order to give evidence himself. While he was giving evidence his place on the bench was filled by another of the Defendants—a justice of the peace; but as soon as his evidence was completed the Police Magistrate returned to the bench and continued to hear the case, and afterwards made the order in respect of which the rule *nisi* was obtained. There were no other magistrates on the bench during the hearing besides the Police Magistrate and the justice of the peace who occupied his place while he was giving his evidence.

The rule was granted on the grounds:—

1. That the whole of the hearing was neither before the Police Magistrate nor before two justices, as required by the Act.
2. That the evidence did not show that any breach of the Act was committed by the Plaintiff, and
3. That certain evidence was improperly received.

Harding moved the rule absolute.

The Attorney-General showed cause.

Judgment.

COCKLE, C.J.:—I think that this rule should be made absolute. For myself, I am disposed to uphold to the fullest extent the principle that where it is necessary to allege a negative it is necessary to prove a negative, and I think that a relaxation of that rule is very likely to give rise to legislation difficult to interpret, and that the more strictly it is adhered to the more clear is the Legislature likely to be in its provisions.

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Judgment.

I do not think that the present case falls within the concluding portion of the 14th section of the 11 and 12 Vic., chap. 43, and that this is not a case in which the information negatives any "exception, exemption, proviso, or condition" under the statute. The report, under "*The Polynesian Labourers Act*," is to be made to the nearest bench of magistrates and to the Immigration Agent in Brisbane; and if it was the intention of the Legislature—that he who alleges a negative must prove a negative—should be departed from, it would have been easy to have inserted in parentheses, or otherwise, the words "proof of such report shall lie upon the person alleged to have harboured or employed Polynesians." That being so, and the maxim, as it appears to me, being both logical and salutary, I think the second objection is a valid one, and, as I have said before, the rule must be made absolute.

LUTWYCHE, J.:—I also think that the rule for this prohibition must be made absolute, but I found my opinion chiefly on the first ground taken. It seems to me that the 23rd and 24th sections of "*The Polynesian Labourers Act*" may well be read together, and that it is required, in all cases where the regulations of the statute have not been followed, that an information should be made and determined by either a police magistrate or two justices of the peace. Now, in this particular case, the information was not heard either by the police magistrate or two justices of the peace. Mr. Buttenshaw, the police magistrate, heard the first witness, and then he left his place and appeared in the witness-box as a witness himself. Now, according to the text writers, at all events, he should then have retired from any further interference with the case. There was another magistrate present (Mr. Bryant), who took down his deposition, but he was not present, it appears, when Mr. Buttenshaw took down the evidence of the first witness. His presence on the bench was therefore not equivalent to the presence of a single justice; and, speaking of the police magistrate only, and of his sufficiency as a tribunal to hear the case, it seems to me that he did not hear the case, as he did not hear the case throughout. I think it would be exceedingly undesirable to hold that the case was heard judicially by him, and I think in point of law that it was not judicially heard by him. That being the case, I think the rule must be made absolute.

LILLEY, J.:—I think also that the rule ought to be made absolute. I think the case was not heard judicially throughout, either by the police magistrate or by Mr. Bryant, who went up for a time on the bench to take his place and hear the evidence of the police magistrate who, it seems to me, had left the bench; and it certainly was not heard throughout by any other magistrate. Upon the first ground, therefore, I agree that the rule ought to be made absolute.

On the second ground, also, I think that the rule should be made absolute. The section says:—"That all persons harbouring or employing Polynesian labourers otherwise than under these regulations without reporting the same to the nearest bench of magistrates and to the Immigration Agent shall be liable to the penalty named."

The Attorney-General contended, on the authority of the 11 and 12 Vic., c 43, that this was an exemption, exception, or condition, which, being negatived in the information, the burden of proof was shifted from the prosecution on to the Defendant. But it is difficult to see which is the exemption, exception, or condition in this section, if the absence of reporting is to be an exception, exemption, or condition. Is the other portion of the section—that the harbouring or employing otherwise than under these regulations—is that, also, a separate exemption or part of the same—does that shift on to the hands of the Defendant? Anyone who may harbour or employ a Polynesian—does it shift on his hands the burden of showing that he employs him in accordance with the regulations? And reported—are these words "otherwise than under the regulations without reporting" to be taken as an exception or exemption?—if so, the information does not sufficiently negative it. But I think it is neither an exemption, exception, or condition, but a substantive part of the defence, a negative which was easily proveable by the prosecution in this case.

The report is to be to his specified authorities—the nearest bench of magistrates and the Immigration Agent; and there could be no difficulty in showing that the party accused had not reported the harbouring or employment of the Polynesian. The rule that the burden of proof of notice, or taking an oath, or of making a report, is shifted on the shoulders of the Defendant, is a salutary rule. Where enormous inconvenience would arise in causing the prosecution to prove it; where it would approach

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Judgment.

to almost an impossibility—for instance: a man having diseased sheep in his possession in the county of Devon, without reporting it to an English constable, in that case it would be thrown upon the prosecution to call all the constables in England, from north to south, to prove that no notice had been given to any one of them. It is clear that the law could never intend that such an inconvenient course of proof should be thrown upon the prosecution. It would be a matter of great ease for the man to prove that he had given notice, and that without the enormous difficulty which would ensue if the other course was followed. But that does not arise here, because, as I have said, there are two specified authorities—the nearest bench of magistrates and the Immigration Agent in Brisbane, either of whom could give the necessary evidence. If it would be inconvenient for the prosecution to bring the Immigration Agent from Brisbane, it would be equally inconvenient for the Defendant to bring him: it is only a question of the burden of expense, and I think it is a more reasonable interpretation of the statute that the burden of expense should be thrown upon the stronger back. The rule will therefore be made absolute.

Solicitor for the plaintiff: *P. Macpherson.*

Solicitors for the Defendants: *Little and Brown.*

1877.

RE THE TRUSTS OF THE WILL OF W. B. TOOTH, DECEASED.

W. B. TOOTH.

Statement.

Will—Mortgage of Devised Estates—Direction under 31 *Vic., No.* 19, *sec.* 6.

A testator being at the time of his death possessed of a station consisting partly of freehold land, and partly of leasehold, and of the stock, by his will directed that it should be carried on and managed under the direction of his Executrix until his youngest child should come of age; but at the time of the testator's death the station was mortgaged for a large sum at a high rate of interest, but the will contained no power for the Executrix to mortgage.

The Court directed that the Executrix should be at liberty to substitute for the existing mortgage a mortgage for a sum not exceeding the liability of the station under the previous mortgage at a lower rate of interest.

Petition for opinion and advice under "*Trustees Act*, 1867."

THE *Attorney-General* (*Harding* with him) for the Petitioner.

Judgment.

LILLEY, J.:—Upon the question of practice that I adverted to yesterday—namely, the necessity or the advisability of having an affidavit verifying petitions presented for advice under this section of "*The Trustees Act*," I adhere to my opinion that it would be better in all cases—and it will be understood to be the

practice before me, at all events—that there should be a short affidavit verifying the allegations in the petition; of course, I do not mean that affidavits should be filed setting out a series of contested facts, because in that case I should refuse to exercise a discretion under the statute, and should leave the parties to proceed by the regular course of practice in the Court, by bill or by an action under "*The Judicature Act.*" Upon the merits it appears that the testator Tooth, at the time of his death, was possessed of various properties—some personal property, and other portions realty. The part of his property with which we are now dealing is that known as "Clifton," the station or run of Clifton. That appears to consist partly of real property lands, I suppose purchased, and partly of personal property, leaseholds, and partly of the stock. So far as the personal property is concerned, the Executrix—in the absence of any prohibition or express direction to deal with the property otherwise—would have the power to mortgage. I think the authorities go to that extent for general purposes under the Will. With regard to the realty, it seems to me that she would have no such power in the absence of express authority. The testator left his property upon trust for sale; but with regard to Clifton, he seems to have been anxious that it should be carried on and managed until the youngest child became 21. That would take away, as it seems to me, any power to deal by way of mortgage, either with realty or the personalty, unless there are other circumstances and directions in the Will which would justify some form of dealing with the property, by way of mortgage or otherwise, for the benefit of the estate. Now, to ascertain whether that is so or not, I must look to the circumstances under which he left his property. At the time of his decease there was a mortgage subsisting upon the whole of Clifton, as I understand it from this petition, of both the personalty and realty, for a very large amount at a heavy rate of interest. If the Executrix has no power whatever to change the form of that mortgage, the intention of the testator may be entirely defeated. I must therefore consider what he meant by carrying on and managing the estate; that, it seems, would give no power to create a mortgage—no power, as it seems to me, to create an original mortgage; on the realty, certainly not, but it might perhaps be otherwise with regard to the personalty There is another circumstance which is very important in ascertaining the intention of the testator, and in enabling me, perhaps,

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to offer some advice to the Executrix, that not only was the estate under mortgage at the time, and that he must have contemplated the power, or probably so, to deal in some way with that mortgage when he directed Clifton to be managed to the best advantage. But the mortgage had been made by himself, subject to advances and payments to the Executrix; so that he must have contemplated the dealing with the estate in a state of mortgage by the Executrix after his death. I am of opinion, also, that a substituted mortgage would be for the relief of the estate, and greatly for the benefit of those for whose advantage he made his Will and created these trusts. I am inclined, therefore, to think and advise, and as far as I have the power to do it, to direct that the Executrix may, under this will, substitute another mortgage for a sum not exceeding the liability when the present mortgage is paid off, at a lower rate of interest; and I think it would be well if that can be effected by way of assignment of the present securities to a new mortgagee, with a covenant on his part to accept that lower rate of interest. But if there be any objection to that, either in form or substance, I see no reason why a new or substituted mortgage should not be executed by the Executrix. The property is devised to her, and the legal estate is in her by virtue of the Will. I may say that it must be effected in such a way as in no way to compromise or prejudicially affect any of the parties under the Will: care must be taken of that. That will be my advice or direction.

I may further add that this statute, instead of being restricted, should be beneficially interpreted and applied. But where there are conflicting interests to be decided under the statute, then it should be restricted, because there is no appeal from the advice or direction given by me.

The costs will be paid out of the estate.

Solicitor for the Petitioner: *P. Macpherson.*

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Fraser
v.
Harden
and
Lomax.

FRASER *v.* HARDEN AND LOMAX.

Sheriff's Sale—Prior Purchaser—Notice of prior Purchase—33 *Vic., No.* 10.

L. being the licensee, under "*The Pastoral Leases Act*, 1869," of certain stations or runs, agreed with F. for the sale of them to him at a price to be paid partly in cash and partly by promissory notes. Payment of the promissory notes was to be secured by a mortgage over the runs and over lands of the purchaser. In pursuance of the agreement the cash was paid and the promissory notes delivered by F. to L., and F. executed the mortgage and entered into possession and continued in

possession of the runs. L. executed letters of transfer of them to F., and deposited the letters with his banker, to be handed to F. upon payment of the promissory notes. L.'s name remained upon the books of the Lands' Office as that of the licensee of the runs. A writ of *fi. fa.* was afterwards issued against the goods and lands of L., and all his right, &c., to the runs was sold at a Sheriff's sale, to satisfy the writ, and bought by H., and a deed in the usual form, conveying all L.'s right, title, and interest (if any) in the runs to H., was executed by the Sheriff.

Held that knowledge of the possession and interest of F. must be imputed to H.

Held, also, that H. acquired no right to have his name substituted for that of L., in the books of the Lands Office, by virtue of his purchase at the Sheriff's sale.

Query, whether the words in the Sheriff's deed, limiting the sale to all the right, title, and interest (if any) of L., were not alone sufficient to render notice to H. of F.'s previous purchase unnecessary.

Statement.

THE Defendant Lomax, being the licensee, under "*The Pastoral Leases Act*, 1869," of certain stations or runs, entered into an agreement with the Plaintiff for the sale of them to him at a price to be paid partly in cash and partly by promissory notes. Payment of the promissory notes was to be secured by a mortgage over the runs and lands the property of the purchaser. In pursuance of the agreement the cash was paid and the promissory notes delivered by the Plaintiff to Lomax, and the Plaintiff entered into possession of the runs and continued in possession of them, and Lomax executed letters of transfer of the runs to the Plaintiff, and deposited them with his banker, to be handed to the Plaintiff upon payment of the promissory notes. Lomax's name remained upon the books of the Lands' Office as that of the licensee of the runs. A writ of *fieri facias* was afterwards issued out of the Supreme Court against the goods and lands of Lomax, and under it all his right, title, and interest in the land was sold by the Sheriff and bought up by the defendant Harden, and a deed in the usual form, conveying all the right, title, and interest (if any) of Lomax, of, to, and in the runs, to Harden, was executed by the Sheriff. Harden then applied to the Commissioner of Crown Lands to transfer the runs and the rights of lease of the defendant Lomax to the applicant. The Plaintiff thereupon gave the Commissioner notice of the sale of the runs to him, and requested him not to proceed in the matter of the application of Harden. The Commissioner declined to accede to the request, and the Plaintiff filed his bill against the defendants. At the time of the commencement of the suit a portion of the promissory notes were still current.

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FRASER v. HARDEN AND LOMAX.

Statement.

The Plaintiff's bill prayed:—

1. For a declaration that the defendant Harden acquired no right, title, or interest in the runs by virtue of the Sheriff's sale.
2. For specific performance of the agreement.
3. For an injunction to restrain the defendant Harden from further proceeding on his application to the Commissioner.
4. Or, if it should appear that the defendant Harden was a purchaser without notice of the agreement, then for damages against the defendant Lomax for non-performance of the agreement.

The Attorney-General and *Harding*, in support of the Bill, cited Holmes *v.* Powell (8 De Gex. M., N., and G., 572); Daniels *v.* Davison (16 Ves., 249, 254; 17 Ves., 433); Shaw *v.* Foster (5, H. L., 321, 349, 356); "*Pastoral Leases Act*, 1869," Regulations, 1st December, 1869, No. 27; Benham *v.* Keane (1 Joh., and H., 685, 697); Finch *v.* Ld. Winchelsea (1 P., Wms., 277); Whitworth *v.* Galgain (3 Hare, 416, 426); Lodge *v.* Lyrely (4 Sim, 70).

Pring, Q.C., and *Pope Cooper*, for defendant Harden.

Beor and *Garrick* for defendant Lomax.

Judgment.

COCKLE, C. J.:—The defendant Harden claims a legal estate in the runs in dispute under a deed-poll from the Sheriff. The question has been raised whether, at the time of the purchase, he had not notice of the previous sale by the defendant Lomax to the Plaintiff. There is no evidence of any express notice to Harden. It is clear that he was a *bonâ fide* purchaser for value, nor was there any constructive notice to him, if constructive notice is to be taken to mean the notice which a man may be said to have who is in that state of mind that he does not know a thing because he has abstained from inquiry; but there is a class of cases which have been decided upon the ground of what may be termed an imputed knowledge. In such cases we may say that notice is unnecessary, either because knowledge is imputed to the purchaser, or because it is not competent to the purchaser to set up want of notice, or because the purchaser is put upon inquiry. The question remains, therefore, whether the present case falls within this third class of cases, for it does not fall within either of the other two classes. There is room to remark how far a person is put upon inquiry by the words of "*The*

Process Act" (31 Vic., No. 4). The object of that Act is to enable creditors to obtain their just rights, not to disturb the rights of others. Moreover, there may be something in the very words of the deed-poll to put a purchaser on inquiry. The words of the deed confine the sale to the right, title, and interest (if any); but the principle laid down in Holmes *v.* Powell is clear, cogent, just, and expedient. The decision in that case does not turn upon any notice of the occupation, so far as I can see; it was implied from the fact of the tenancy. The Lord Justice Turner goes into the evidence for the purpose of seeing whether there was an occupation, and not whether there was notice. The case of Daniels *v.* Davison adopts the same principle, and, though that case has been questioned, it has not been questioned on this point. In the case of Harvey *v.* Smith (22 Bea., 299) there was no knowledge of the fact that the owner of a neighbouring property was entitled to an easement, and yet the purchaser was fixed with implied notice.

It was contended, on behalf of the defendant Harden, that Fraser was not rightly in possession of the premises; but in Harvey *v.* Smith the person in possession of the easement had no grant, and it was held unnecessary for the purpose of imputing notice to the purchaser. Moreover, it is doubtful whether it is competent to Harden to deny the Plaintiff's right. I am unable to follow Harden's claim to have his name entered in the books of the Lands' Office as lessee or licensee of the runs. If the equities attach, why should the runs go into his hands? If they do not, he would be entitled to something more.

Declare that the agreement ought to be performed.

That the defendant Harden be enjoined, according to paragraph 3 of the prayer of the bill, until further order.

Reserve further consideration.

Defendant Harden to pay the Plaintiff's costs.

Defendant Lomax neither to pay nor receive costs.

Solicitors for the Plaintiff: *Little and Browne.*

Solicitor for defendant Harden: *P. Macpherson.*

Solicitors for defendant Lomax: *Bunton and Mayne.*

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May 1.

THE QUEEN v. TOMMY AND GEORGE.

THE QUEEN v. TOMMY AND GEORGE.

Evidence—Witness ignorant of the nature of an Oath—Appeal—40 Vic., No. 9, sec. 1—Statement before Magistrate.

It is not necessary that the declaration contained in the first section of "*The Oaths Act Amendment Act*, 1876," should be repeated by a witness ignorant of the nature of an oath, or other witness included in the section, in order to make his evidence admissible. It is sufficient if the declaration be read or repeated to him, and his assent to it is clear. The question whether the witnesses' assent is clear or not is one upon which there is no right of appeal from the decision of the Judge presiding at the trial.

In a criminal case, it is competent for the prosecuting counsel to ask a witness a question relating to statements of the witness made on his examination before a police magistrate, provided it be in explanation of an answer relating to his statements at the same examination given by the witness on cross-examination by the counsel for the prisoners at the trial.

Case stated by Mr. JUSTICE LILLEY:—

Statement.

The prisoners were tried and convicted at the Maryborough Sittings, in April last, of the crime of rape, on the person of Annie McBride. A Polynesian Islander was called by the Crown Prosecutor to give evidence for the prosecution. I made inquiry of the witness personally, and through the Interpreter, and was satisfied that the taking of an oath would have no binding effect on his conscience. Henry Benwell, a christian and European, was then sworn as Interpreter in due form, under "*The Oaths Act of* 1867." I was satisfied that he understood the language of the witness and of the prisoners, and I then read the promise and declaration in the first section of "*The Oaths Amendment Act of* 1876" to him, and he repeated it (as it appeared to me) to the witness, in the hearing of the prisoners, the three of them speaking the same language, as the Interpreter informed me. The witness used words after him, and made a motion of assent with his head. I asked the Interpreter, when the declaration had been fully read, whether the witness perfectly understood it; the Interpreter told me that he did, and that he understood the consequences of falsehood. I caused the Interpreter to ask the witness whether he believed that bound him to speak the truth; the witness immediately replied in broken English, "Me no tell a lie;" and the Interpreter told me that he (the witness) understood that it bound him to speak the truth, and that he would speak the truth. I told him, further, to tell the witness that if he told a lie—that is, did not speak the truth—he would be liable to be placed where the prisoners then stood in the dock, and to be punished for his falsehood. I was satisfied that he clearly understood the meaning of the promise and declaration

in the Act before I proceeded to take his evidence. At the moment I made the following note in my book:—"Captain Cook," a Polynesian, is called by the Crown Prosecutor to give evidence.

Henry Benwell, sworn to interpret between witness and the Court and prisoners. Witness says the prisoners and the witness speak the same language, and then proceeds to interpret.

Captain Cook, on my being satisfied that the requirements of section 1 of "*The Oaths Act Amendment Act*" have been complied with, and that I am satisfied as therein required, proceeds as follows:—[*Here follows the evidence.*]

At the close of the case, Mr. Cooper demanded that I should state a case on behalf of the prisoners.

I made the following note:—"Mr. Cooper demands that I should state a case under '*The Criminal Practice Act*,' he having required that the witness (Captain Cook) should make the declaration in the first section of '*The Oaths Amendment Act*' in any language intelligible to him. Mr. Cooper says he assented to it only (my impression is that the witness made the declaration). I am satisfied that he understood it as required by the section."

I reserve the question No. 1 on this part of the case. In addition thereto, I reserve, as a matter of practice and for guidance in other cases, the question No. 2.

Another witness, named John McBride, was called, and deposed that he found a hat seven yards from blood near the gate where the prosecutrix had been ravished, and about four yards from the door of her house. It was a little way toward the creek, off the line between the first-mentioned spot and the house of the injured woman, and in the direction which she had sworn her ravisher took after rising from her body. The witness (John McBride) described the hat in his examination-in-chief in the following words:—

"The hat was a soft felt hat, although out in the dew it had got stiff; it was a white felt hat. There were two holes cut in the crown of the hat on the side of it. (*Witness looks at hat produced by Shea and sworn to by Jackson*). I believe this to be the hat."

The following examination and re-examination then followed:—Cooper cross-examined: "I could not exactly say whether the hat I picked up had brass rings to fit into the holes. I said

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to the police magistrate not. I do not think the hat produced is the hat I gave to Mr. Jackson; the holes did not come so far round, and there were brass rings round the holes in the hat, but 'I thought the hat produced had brass rings.' I don't remember what I said about the holes before the magistrate. My memory is not much different now to what it was at the police court."

Statement.

Pring re-examined: "I was examined on two separate occasions before the police magistrate. On the second occasion I was examined particularly as to the evidence I had given before about the hat.

"Did you not on the second occasion, when examined in reference to the hat, say I did not know what I was doing, and therefore was not very accurate as to the description of the felt hat?"

Mr. Cooper objects: "The witness can't be asked by the prosecutors what he said before the magistrate. I allow the question."

The depositions were not put in, nor was the witness's attention drawn to them, either by the counsel for the defence or prosecution, nor were the depositions placed before the Judge.

Witness says, "I did say that, and on the same day that I made the previous statement about the hat."

At the close of the case, Mr. Cooper required that I should reserve the question No. 3.

The questions for the consideration of the Court are:—

1st. Were the requirements of section 1 of "*The Oaths Act*" complied with? 2nd. Is this question a subject of appeal from the presiding Judge? 3rd. Was the evidence of John McBride, on re-examination by Mr. Pring, wrongly received.

The Attorney-General for the Crown.

Pope Cooper for the prisoners.

Judgment.

COCKLE, C.J.:—It was conceded by Mr. Pope Cooper that the grounds on which the Judge is satisfied, either that an oath would have no binding effect, or that the witness understands the meaning of the promise or declaration, could not be questioned in this Court, and his argument on the first point mainly rested upon the practical mode of giving effect to the provisions under section 1 of "*The Oaths Act of* 1876," respecting the promise or declaration. Were the requirements of that section not complied with, probably that would be a good objection to the competency of the witness; but I apprehend that in

all cases where a suggested ground of incompetency could be removed by eliciting fresh facts, it is necessary to take the objection to the competency of the witness before he gives his evidence. However, even assuming that there had been here an objection to the competency of the witness, and taken in due time, it seems to be the opinion of all the members of the Court that the requirements of that first section were substantially complied with; indeed, there seems to have been—I will not say unusual, but certainly great—care taken about the preliminary matter, for we find His Honour stating, not only that he was satisfied that the witness "clearly understood the meaning of the promise and declaration," but the further statement "that Captain Cook, on his being satisfied that the requirements of section 1 had been complied with, gave his evidence." The first objection therefore fails. Moreover, His Honour says, "my impression is that the witness made the declaration." That being so, the second point—whether "this is a subject of appeal from the presiding Judge"—seeing that this particular point does not touch the question of the satisfaction of the Judge upon either of the two points mentioned in the section (it turns upon the competency of the witness), I think in this particular case it was not the subject of appeal.

Now comes the third question, upon which Mr. Pope Cooper most strongly insisted: "Was the evidence of John McBryde, on re-examination by Mr. Pring, wrongly received?" I think it is necessary to uphold the principle that, when an objection is taken to evidence, the grounds of the objection should fully appear, because the objection might be in the nature of a matter of fact, and the difficulty arising from the want of proof of the fact might be removed if the objection was fully stated; and unless care be taken to remove objections arising upon the facts, the administration of the law would become rather a matter of chance than of strict rule. Now, in this case the prisoners were defended; a question was put, and objected to by Mr. Pope Cooper, thus: "The witness cannot be asked by the prosecutor what he said before the magistrate." I cannot see in that that any specific point is adverted to, except this—that under no circumstances is what a witness said before the magistrate to be the subject of re-examination. I can conceive, without expressing any opinion as to the validity of the objection, at least three several grounds capable of being explicitly taken: say, first, that two occasions were pointed to—that ground certainly is not

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stated; I can conceive, again, that the evidence being required by law to be put in writing, the writing would be the proper mode of proving what he said—that is not pointed to; and the third ground, which I have mentioned several times in the course of the argument. None of these three grounds were expressed or the attention of the Judge in any way called to them. The only point in connection with this matter arose upon the answer of the witness. Before this evidence could be pronounced inadmissible, and the result of the trial affected, the Court will have to say that the times upon which the two statements were made were so remote that the statements could not be considered as forming part of one continuous statement, and there are various circumstances not necessary to speculate upon which might render any conclusion of the kind wrong. I think, therefore, seeing how important it is that we should not depart from the maxim—that the grounds of an objection should be clearly pointed out—and the case, which seems to have been taken to procure the salutary operation of "*The Oaths Act of* 1876," I think it would be a great miscarriage of justice if this Court disturbed the conviction: I think the conviction should be confirmed.

LUTWYCHE, J.:—There are three questions raised for the consideration of the Court in this case. The first is, were the requirements of section 1 of "*The Oaths Amendment Act*" complied with? I think they were. The words, "to the like effect, *mutatis mutandis*," in the first clause, clearly show that it is not necessary that there should be a literal declaration by the witness in the form given by the Act. If there is a substantial declaration to that effect, that is enough. Mr. Cooper agreed that the witness did assent to the declaration read over by the Interpreter. Now, assent is an act of understanding, and is a declaration of agreement; and when the witness (as in this case) used words after the Interpreter (who read them), and nodded his head by way of assent, I take it the requirements of the first section of the statute were, so far as the declaration goes, fully complied with. Then, it appears further that the presiding Judge did satisfy himself, before the witness was examined, that he understood the meaning of that declaration, and that being so, everything was done that that part of the Act requires. Then we come to the second question: "Is this, the first question, a subject of appeal from the presiding Judge?" Now, we are bound by the facts stated in the case, and this question has been left to us by

the Judge who presided at the trial—but, in my opinion, the first question was not a matter of law which should have been raised by the learned counsel for the prisoners;—whether the requirements of the first section were complied with or not seems to me to be a matter for the discretion of the presiding Judge, and it was not competent for the learned counsel for the prisoners to require a matter to be stated for the consideration of this Court, which, in my opinion, was not a matter of law but of practice. Then we come to the third and the only important question in this case: "Was the evidence of John McBryde, on re-examination by Mr. Pring, wrongly received?" I think it was rightfully received. It is quite clear that it was competent for the Crown, in re-examination, to inquire into the nature of the statements that had been made by the witness before the magistrates, when he had been distinctly asked whether he had not said a certain thing. The question was intended in cross-examination—as Mr. Cooper himself admits—to damage the credit of the witness, by showing that he had made one statement before the magistrates, and a different one before the Judge who presided at the trial. Then it was competent to the counsel for the Crown to re-examine him on that point, and to set up his credit. The question in re-examination fairly and clearly arose out of the cross-examination, and therefore I think the question was properly allowed to be put. On the whole, I come to the same conclusion as the learned Chief Justice has done—that this conviction ought to be affirmed.

LILLEY, J.:—I agree with the other members of the Court that this conviction should be affirmed. There is no doubt that "*The Oaths Act Amendment Act*" is somewhat difficult to administer, but under this first section I think it is certainly not impossible to arrive at a very fair conclusion on the facts by diligent inquiry. I made that inquiry, and I was satisfied, so far as it was a matter of fact, that the witness had substantially made the declaration, and that he understood it; indeed, that was evidenced by his instantaneously expressing himself, at the close of my reading the declaration through the Interpreter, when he said, "Me no tell a lie." I took some trouble to bring to his mind as far as I could—and I think I succeeded—that the consequences of falsehood would be his punishment, his trial in a Court such as he was then in, and his punishment for not telling the truth. Then the fact being satisfactorily established in the mind of the Judge that the witness fully understood the

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declaration and the consequences of breaking it, it seems to me there was nothing for the consideration of the Court of Appeal; therefore, I shall answer the first question in the affirmative. That brings me to the second question: "Is this a subject of appeal?" So far as the Judge is constituted by the statute as the judge of the fact I think it is not appealable, if he has made any inquiry in the matter; if he has taken no evidence or made no inquiry in the matter—if he has utterly failed to do that portion of his duty—then the case would assume a new form, or might do so, if counsel had objected to the competency of the witness when his evidence was about to be taken. But that would be not so much a matter of law arising upon the statute as a question of omission on the part of the Judge of his duty; in that case, if the Judge should certify, either by the statement of the Judge himself or by counsel, that he had omitted to put any declaration to the witness, the evidence would have been wrongly received; and from that point of view it would be appealable, and from no other. Then, as to the third question: "Was the evidence of John McBryde, on re-examination by Mr. Pring, wrongly received?" I have no doubt, and have never had any doubt, on the matter. The only arguable question, as it appeared to me at the time, upon this portion of the case, was, "were the two statements made at such a remote interval of time that, as corrections, they would be utterly worthless, or of such light weight that the Judge would not allow it to be received." Now, I myself, in the interest of the prisoners, asked the question whether the two statements were made on the same day, and the answer was that they were. So far as it appears, they might have been made within five or ten minutes of each other; but they were practically almost instantaneous, for the man himself says that when he made his first statement he did not know what he was saying or doing, as can easily be conceived in the case of a man whose wife had been so brutally outraged. So that, substantially, his second statement was made when he was in such a state of mind as to be able to make a statement that was reliable; it might, in point of fact, be taken as his first statement on the subject. I thought, therefore, that it was admissible, and admitted it accordingly, and the argument has still more strongly confirmed me in my opinion that it was properly received. It rested upon the simple and old practice that where a witness is attacked in his credit he is at liberty to defend himself by supporting it, and the re-examining counsel

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has the same privilege;—he can support the witness, and can rehabilitate him if he has been damaged by anything in the cross-examination. I think, therefore, that the question was clearly properly admitted; the only question would be as to the form in which the question was put. In form it is called a leading question. Now it is the duty of counsel and not of the Judge, as a general rule, to object to the question as being a leading one. If the prisoners had been undefended I myself might have interposed, and told the prosecutor that the question was a leading one. If it had been raised by counsel it would have been in my discretion to order the form of the question to be altered; but if I had chosen I could have allowed this question to be put to the witness, although I doubt if I should have allowed it to have been put in that form;—it is possible I might have interposed and required the form of the question to be changed. It is quite conceivable that the counsel for the prisoners might himself wish to have the question put in a leading form—he might see some advantage which the Judge did not; so that it might be even mischievous if a Judge were to interfere and disallow a question because it was a leading one. Upon the whole case, I think the conviction must be affirmed.

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Mandamus—Justices—Appeal—Rating—28 Vic., No. 21, sec. 79.

Lands and houses in a municipality having been assessed by the Municipal Council at a certain sum, and the assessment entered in the assessment book of the Council, the amount was afterwards altered without their authority, and notice of assessment of the property, at the substituted amount, served upon the owner. The owner appealed against the assessment, and the Justices, having heard evidence disclosing the above facts, decided that the assessment—notice of which was served upon the owner—was not the assessment of the Council, and declined to proceed any further with the inquiry.

Held, that there was no ground for a *mandamus* to compel the justices to hear and determine the appeal.

Statement.

CERTAIN lands and houses in Ipswich were assessed for rating purposes by the Municipal Council at the value of £30 and £110, and the assessment entered in the assessment book of the Council. The amounts entered in the book were afterwards altered, without the authority of the Council, to £35 and £120 respectively, and notice of assessment of the property—at the larger amounts—was served upon the owner. The owner appealed to the magis-

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trates in petty sessions against the assessment, and they decided, after hearing evidence disclosing the above facts, that the assessment—notice of which was served upon the owner—was not the assessment of the Council, and declined to proceed any further with the inquiry.

A Rule *nisi* to compel the magistrates to hear and determine the appeal having been granted,

The Attorney-General and *Power* moved the rule absolute, and cited Regina *v.* Freemen of Leicester, 15, Q.B., 671; Regina *v.* Mayor of Monmouth, 5, L. R., Q.B., 251.

Real showed cause, and cited Regina *v.* Kesheven, 3, Q.B., 896.

Judgment.

COCKLE, C. J.:—The 79th section of "*The Municipal Institutions Act*" provides that "if any person shall think himself aggrieved by the value at which his property has been assessed at the assessment thereof for the current year, he may appeal against such assessment;" and if we are to refer the appeal to that assessment which was last mentioned, and to interpret the section accordingly, it would seem that an appeal will lay against the whole assessment. I do not think that either rational interpretation or popular acceptation, or either of them, are infringed by taking that view; for, a man who ought not to be rated at all, by being rated might feel himself aggrieved by the value at which his property had been assessed. Now, again, on looking further down this sentence, you find that an appeal to a court to be held on a day "not being earlier than twenty-one days after such service of notice as aforesaid." Now, it might be that a person having received a notice which he believes not to represent or refer to any rate actually made, yet being apprehensive that he may be distrained upon or otherwise vexed if he did not appeal, may go to the next court of petty sessions, and, without admitting the notice to be a good one, may take it to be so far good as to afford him a *locus standi*, and he may so protect himself from the consequences of this notice, which he alleges to be an unjust one. Taking that to be a preliminary notice, it might be that the justices might say to the appellant, "The notice may be irregular, but undoubtedly some such rate as this was made: you ought to have gone to the Town Clerk, pointed out the discrepancy, and have had the mistake rectified." But can we say that the magistrates were bound to take such a course? If they thought the discrepancy so serious, and that the repetition of such discrepancies might prove injurious to the community at large, can we blame the magistrates if they took another view,

and said, "No; we leave you to begin again; we do not think the public at large should be harassed." I think, even taking this to be a preliminary point, we ought not to interfere with the discretion of the magistrates, unless we can say that it has been wrongly exercised; and, for myself, although, perhaps, the other course would have been equally convenient, I cannot say that the magistrates exercised their discretion wrongly: their powers are somewhat ample; they may afford relief as the justice of the case requires, and their decision is to be final, as far as the matter of the appeal is concerned. I do not attach much weight to the portion of the section providing that the decision shall be "deemed to be notice to the appellant to pay the sum decided against him," because, if no sums whatever were decided to be payable, why, it would not be notice to pay any sum. It would be a strained meaning to say that that rendered it necessary for some sum to be mentioned: probably the true meaning in law would be, "it shall be notice to the appellant to pay the sum, 'if any,' decided against him." I think that to hold that the appeal was against the whole of the assessment is by far the most salutary interpretation to be placed upon this section, and I think, therefore, that this rule for a *mandamus* must be discharged.

LUTWYCHE, J.:—I am of the same opinion. It appears to me that, under this Act, the justices in petty sessions assembled have power to decide whether an assessment has been properly made, or whether, having been properly made, the assessment in the case of an individual who appeals has been too great. The Act gives any person who thinks himself aggrieved by the assessment power to appeal against it, and that privilege he may exercise by asking for the rate to be reduced, or by contending that it ought never to have been made at all as against him. The complaint made against the magistrates in this case was, that they had neither heard nor determined the matter of the appeal; but they say that they did hear and determine it, and, having heard the evidence of the Town Clerk and of Peter Brown—the assessor appointed by the Council, and after having seen the minutes which were produced, it appeared to them that the "assessment—notice of which had been served upon John Pettigrew—was not the assessment made by the assessor appointed by the Council, nor in any other way the assessment of the said Council;" and that affidavit is borne out by that of Peter Brown,

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who says, "that he made an assessment, and it was approved of by the Council; that it was afterwards altered—by whom does not appear; that he was then asked by the Town Clerk to assent to the alterations, and that he met that application by a flat refusal." That there was no other assessment made appears, also, from the fact that no minute of council could be found showing that another assessment had been made. The magistrates, therefore, appear to me to have decided that, in point of law, no assessment was made. I think they were quite right; and if they were right on a matter of law no *mandamus* can issue against them, and upon that point alone the rule ought to be discharged.

LILLEY, J.:—I think the rule ought to be discharged, and with costs.

Attorney for the Plaintiff: *C. E. Chubb.*

Attorney for the Defendants: *J. O'Sullivan.*

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IN RE THOMAS PERKINS, DECEASED.

Intestate—Administration—Foreign Court.

"*The Judicature Act*" does not necessarily require that all contentious proceedings in Probate should be by way of action. The Court may, upon motion, direct issues to be tried when the proceedings have not assumed the form of an action.

A plaintiff who has obtained in a foreign court a decree for an account against a defendant who has since died intestate, leaving property in Queensland, has a right to ask that an Administrator should be appointed here.

Semble: If the personal representative declines to administer, the applicant will not be appointed Administrator, but the Curator of Intestate Estates will be appointed.

Statement.

Harding applied, on behalf of Thomas Stacpoole, for an order calling upon Bridget Mary Perkins, widow, to take out letters of administration of the estate of Thomas Perkins, deceased, within fourteen days, or submit to a decree that such letters should be granted to Stacpoole, who claimed to be a creditor.

The Attorney-General, on behalf of Mrs. Perkins, opposed the application.

Judgment.

LILLEY, J.:—Thomas Perkins died in 1876 intestate, and domiciled in Queensland. He left personal property to which no administration had been taken out. He also left a widow surviving him, who has been cited, and she has appeared. A motion has been made that she be required to take out letters

of administration within fourteen days, or that they may be granted on her default to Stacpoole, who claims to be a creditor of the deceased. On the death of Perkins his personal estate vested, under section 2 of our "*Probate Act*," in the Chief Justice, in like manner as it would under the old law have vested in the Ordinary in England. None of the next-of-kin make any claim. There are, therefore, two parties before me claiming or having a right to administration, the widow and an alleged creditor, and a third party, so to speak—the court, which has a duty to perform in the matter—namely, to see that the personal estate of the deceased is collected and properly distributed. The right of the widow to administration is conceded, and in respect of that there is no contest. She has not stated whether she will accept or reject administration, and it seems to me to be clear on authority that I have no power to compel her to administer. She claims, however, without making an election herself, to be entitled to contest the right of the alleged creditor to have administration committed to him. He rests his claim as creditor upon the fact that in a suit in the colony of Victoria by him against Perkins, to which Perkins appeared and submitted to the jurisdiction, a decree was made in the lifetime of Perkins entitling his alleged creditor, Stacpoole, to an account. No account was taken, and in the meantime, by the death of Perkins, the suit has become defective. The alleged creditor claims a right to have an administrator appointed in this jurisdiction, in order that the suit in Victoria may be carried on by making the administrator here a party to it, or that, by the appointment of an administrator here, he (Stacpoole) may be in a position to sue within this jurisdiction. He has claimed that he himself should be appointed administrator, but he is willing that administration should be granted to any proper person, so that he may be in a position to seek his account against the estate of the deceased. It has been objected on behalf of the widow that the present application by way of motion is irregular, and not according to the present practice of the court; that the proper course is by a probate action under "*The Judicature Act*." This objection is based on the ground that the subject-matter of the application has become contentious business, and not common-form business within the meaning of "*The Probate Act*" and "*The Judicature Act*." It is not disputed, nor do I think it could be, that the business in its inception was common-form business and not contentious; if it

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is now contentious business it has become so by the conduct of parties, or by matter subsequent to the citation, which I think was properly issued. I have been referred to Dodd and Brooks' "Probate Practice," in which it is stated that "on appearance the business becomes contentious." I think the proposition is too large. A party may obviously appear without intending to contest the right alleged by the party citing. He may appear for the purpose of submitting, and stating his intentions to take out administration where his right is conceded, as in this case; the right of the widow is admitted. It is clear, also, that in many cases matter in respect of which no contest is anticipated may become contentious, and the question for me is whether it is inevitable that the moment a contest arises the parties must proceed *de novo* in a probate action, or whether I must order the proceedings subsequent to appearance to be taken in accordance with "*The Judicature Act.*" I think "*The Judicature Act*" does not necessarily require that all contentious proceedings should be by way of action. I think the Court, when matter originally non-contentious assumes the character of a contest, may still continue the proceedings on the citation, and may direct an issue or issues to be tried to ascertain the necessary facts for a decision. The interpretation clause of the Act merely shows what business shall be included in the procedure called a "probate action," and excludes its application to "common-form business," but it does not abrogate the other practice of the Court, or require a departure from the former course of procedure where the proceedings are originally well founded and correctly taken. The question then arises, Is there anything in the nature of a contest in this case which requires any question of fact to be submitted to a jury? If I directed an issue to try the right of the widow, I should perform an entirely useless act, because it is not denied, and she can have administration whenever she sees fit to apply for it; so that, whether she were made plaintiff or defendant in such an issue, it would be an unnecessary act on the part of the Court. With regard to the right of the alleged creditor, the facts upon which it is founded are, in like manner, not in dispute. He has not yet been proved to be a creditor of the deceased. He has established in a suit, in a foreign jurisdiction, a right to an account; but it is manifest, from the form of the decree which is set out in the affidavits, that on the account taking he may be shown to be either no creditor, or, in fact, a debtor; but whether creditor or debtor, he would, under ordinary

circumstances, seem to have a right to insist that administration should be granted to some person. If a creditor, he would at least in this jurisdiction have a right to litigate his claim; if a debtor, he may fairly say, "I wish to discharge my debt, to be rid of all further trouble about it, and to know to whom I am to pay it—who is the person legally entitled to receive it and give me an acquittance." The facts being undisputed as to the position of the alleged creditor, that he has a right to litigate at least, the question of granting administration to him becomes one of mere discretion to be exercised by the Court. Under the circumstances of this case, I should decline to grant administration to him personally, because he would be at once placed in the position of plaintiff and defendant, of a party seeking an account and being himself the party to render it—a position which would enable him, and indeed give him an interest, in doing injustice to other parties interested. Nor would I, by appointing him, enable him in effect to place the administration of the goods of a domiciled Queenslander in the hands of the Court of a foreign jurisdiction, and I should restrain any other person whom I might appoint as administrator from accounting to any Court not having jurisdiction in the colony of Queensland. There is a necessity for administration of the deceased's estate, and whilst the widow, who has the right to administer, refuses to do so, or makes no attempt to obtain the legal status of administrator, she at the same time opposes the claim of the alleged creditor, without asserting a better right either in herself or any other person. Under such circumstances, the result of an inquiry or trial could only be, if adverse to the alleged creditor, to leave us where we are, with an estate unadministered, in the hands of we know not whom, and with a prospect of renewed litigation at the instance of the widow, who may in like manner seek to contest the right of any person other than herself to administer the estate. To leave affairs in this position would be to give deliberate encouragement to waste and to the unauthorised possession of the estate by persons having no legal title. I do not think, therefore, that there is anything in this case strictly of a contentious nature which requires the intervention of an inquiry before a jury. The facts are all before me, and I think I am in a position to exercise the discretion of the Court in granting or refusing administration. It is clear that there is a personal estate, probably of considerable value, remaining uncollected, and liable to waste. It seems to me *prima facie* that the applicant Stacpoole

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has at least a right to litigate his alleged claim in this jurisdiction. The estate is now vested, as I have said, in the Chief Justice, and it is the right and duty of the Court of the deceased's domicile —that is this Court—to order that the estate be collected and properly administered for the benefit of the person or persons entitled in distribution (Enolim *v.* Wylie, 10 H.L.C., 1). I do not advert to the rights of the Crown, because the order I am about to make will sufficiently protect them. I shall therefore order that the widow elect within seven days whether she will take out administration or not, and that she takes out such administration within twenty-one days from the date of this order; in default, that administration be committed to Alexander Raff, the Curator of Intestate Estates, and that he be ordered to account only to this Court for his administration until further or other order. I reserve all questions of costs.

Solicitors for Stacpoole: *Little and Browne.*

Solicitors for Mrs. Perkins: *Hart and Flower.*

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BEARKLEY *v.* PURTILL AND ANOTHER.

Specific Performance—Sale of Land.

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Upon a sale of a portion of land by auction, it was a condition of sale that the balance of the purchase money beyond £100 should be paid by the purchaser's promissory note at four months, and that, upon payment in full of the purchase money, the vendor should execute a conveyance of the land to the purchaser. The purchaser gave his promissory note for the balance of the purchase money, and before it became due paid the amount into the bank at which it was due, to the credit of the auctioneer, by whom the land was sold. The promissory note was not met, and the vendor did not execute any conveyance. The vendor died, leaving a Will, by which he appointed executors, and which was duly proved. On a suit being brought against the executors by the purchaser for the specific performance of the agreement for sale,

Ordered, that the Defendants execute a transfer of the land to the Plaintiff on payment of the balance of the purchase money, and that the Plaintiff pay the costs of the suit; or, if the Defendants decline to execute a transfer, damages be assessed, and each party pay his own costs.

Statement.

BILL of Complaint:—One Sondergeld, being the registered proprietor of portion 40, in the Toowoomba Agricultural Reserve, on the fourteenth day of December, 1874, caused it to be put up to auction, subject to the following conditions — that the purchaser should pay a deposit of £100, and give his acceptance for the residue of the purchase money at four months, bearing interest at ten per cent.; that the vendor should, upon the payment of the full amount of the purchase money, execute a conveyance of the land to the purchaser.

The Plaintiff became the purchaser of the land at the auction at the price of £215, and paid £100 cash to the auctioneer, and gave him his acceptance for the balance at four months, payable at the Queensland National Bank, Toowoomba, and a day was agreed upon by Sondergeld and the Plaintiff for executing a transfer of the land. Sondergeld, however, never executed any transfer, and always refused to execute one. Before the commencement of the suit Sondergeld died, leaving a Will which was duly proved, and by which he appointed the Defendants his Executors. They also declined to execute a transfer of the land to the Plaintiff, and this suit was brought by him for the specific performance of the agreement. The Defendants, by their answer, denied that the purchase money had ever been paid by the Plaintiff. The evidence in the case showed that the promissory note was lodged in the Queensland National Bank for presentation, and that the amount of it was paid by the Plaintiff into the bank to the credit of the auctioneer by whom the land was sold. At the time of the commencement of the suit it was still held by the bank for the auctioneer, and the promissory note had never been met.

Statement.

Harding for the Plaintiff.

The Attorney-General and *Beor* for the Defendant.

Judgment.

COCKLE, C.J.:—It has not been contended that the right, if any, of the plaintiff has been abandoned, or that time has been made of the essence of the contract. Judging from the projected receipt on the back of the agreement, it was intended that the bill or promissory note should be necessarily payable at the bank named; but in such case the money should have been paid in to the credit of the plaintiff, as otherwise the endorsee or bearer would not be paid, nor even if Mr. Sondergeld were the holder could he be paid without his own agent's authority. The intention, however, was not carried into effect, and I have to look at other facts. It would appear, on the evidence of Mr. Mackenzie, that £118 was, on April 17th, 1875, paid into the bank by the plaintiff to the credit of Mr. Robinson, for the purpose of retiring a promissory note made by the plaintiff, in favour of Mr. Sondergeld; that the money was very lately lying in the bank to the same credit; that the note was left at the bank by Mr. Robinson, to whom it was returned on June 26th, 1877; that by a note in the corner the promissory note was made payable at the same bank; and that it was left with Mr. Mackenzie for presentation at maturity. According to the affidavit of Mr.

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Robinson (par. 5), on April 17th, 1875, the plaintiff paid £118 into the bank to provide for the promissory note, and that £118 is now held by the bank for Mr. Robinson, as agent for Mr. Sondergeld, to provide for the same; and it would seem (par. 2) that the note came into Mr. Robinson's hands from the plaintiff. From Mr. Hamilton's affidavit (par. 7) it appears that the note was in favour of Mr. Sondergeld, and from the plaintiff's affidavit (par. 7) that it was at the request of Mr. Robinson that the plaintiff paid the £118 into the bank. It is not shown that Mr. Sondergeld ever authorised or required, or even wished or contemplated, the payment to Mr. Robinson's credit, or ever recognised such payment as a payment to him of the note. Mr. Robinson's letters (par. 6) are consistent with the supposition that the note required endorsement, and was not endorsed by Mr. Sondergeld. That the note was not paid at maturity, and was very lately in Mr. Robinson's possession, are facts equally consistent with the supposition. If it be payable to bearer, that fact might have been shown; as it is, there is a defect of proof of authority to the agent to receive, or to the plaintiff to pay to the agent's credit, or to the agent to have the money paid to his own credit at the bank. I do not find that the £118 was paid, and I think the plaintiff was never absolutely entitled as against the trustees. If the defendant Purtill wishes for his costs, the transfer must, on payment of the remainder of the purchase money, be made. If he consent to do this, the plaintiff must pay the costs of this suit. If he refuses, there must be an assessment of damages; but I shall leave the parties to bear their own respective costs hitherto incurred. The defendant may pay in a sum to cover damages. The taking forcible possession (to say nothing of the accompanying circumstances) is an inexpedient course for a man to pursue who wishes for the interposition of this Court. I cannot, however, accede to paragraph 19 of the answer. The remedy was under section 13 of "*The Common Law Practice Act.*" Leave to apply, if necessary.

Solicitors for Plaintiff: *Hamilton and Son*, by *Thynne.*
Solicitors for Defendant: *Dodd*, by *Daly and Abbott.*

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PETTIGREW v. TOWNLEY AND OTHERS AND McNEIL.

Prohibition—Justices—Petty Sessions—Small Debts—Costs—17 *Vic.*, *No.* 39, *sec.* 5; 31 *Vic.*, *No.* 29, *sec.* 9.

A writ of prohibition will issue to the Justices of a Court of Petty Sessions whenever they have decided without jurisdiction, or have exceeded their jurisdiction.

A Court of Petty Sessions cannot allow more than £2 2s. for professional costs to either party in any Small Debts cause decided by it.

Statement.

Real, for the Plaintiff, moved absolute a rule *nisi*, calling upon the Respondents to show cause why a writ of prohibition should not issue to prohibit them from proceeding upon an order made by the Respondent's justices, whereby the Plaintiff was ordered to pay to the respondent McNeil certain costs and expenses.

The facts sufficiently appear in the judgment.

Judgment.

LUTWYCHE, J.:—An order *nisi* was granted on the 9th instant, calling upon the respondents to show cause why a writ of prohibition should not issue to prohibit them from proceeding upon an order made by such justices on the 4th instant, whereby Pettigrew was ordered to pay to McNeil £9 8s. for costs, being £3 3s. costs from District Court, £4 4s. professional costs, £2 witnesses' expenses, and 1s. filing plea, upon the following grounds:—

1. That, having given a verdict for the plaintiff, the said justices had no power to order the plaintiff to pay costs to the defendant.

2. That the said justices had no power to order the plaintiff to pay the defendant £4 4s. professional costs.

3. That the said justices had no power to order the plaintiff to pay the defendant £2 for witnesses' expenses.

4. That the said justices upon giving their verdict were *functi officio*, except for the purpose of making an order under the provisions of sections 2 and 3 of the Act 33 Victoria, No. 4.

It appeared from the voluminous affidavits which were filed on both sides that a cause in which Pettigrew was plaintiff and McNeil defendant was originally heard at the sittings of the Petty Debts Court held in Ipswich on the 7th of March last.

The cause of action was for goods sold and delivered, and the plaintiff sought to recover a debt of £29 3s. 3d. The defendant pleaded a set-off as to the sum of £19 10s., and, as to the sum of £9 13s. 3d., the balance of the plaintiff's claim, the defendant paid that sum into court,

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together with 6s. costs, making altogether £9 19s. 3d. This sum the plaintiff took out of court, and, after hearing the cause, the justices of the Court of Petty Sessions caused the following entry to be made in a book kept at the Court House, Ipswich, in which small debts cases heard at Ipswich are entered:—"Verdict for plaintiff, debt £9 13s. 3d., costs 6s., total £9 19s. 3d." The plaintiff being dissatisfied with this verdict, appealed to the Southern District Court, and, the appeal having been heard on the 20th March, the Judge ordered that the case be sent back to the Court below for a new trial, the costs of the appeal, £3 3s., to be costs in the cause. On the 2nd of May last the case came on again for trial before two justices in the Petty Debts Court at Ipswich, and, after hearing evidence on both sides, the Bench were unable to agree, and the case was adjourned *sine die*. At a sittings of the Court of Petty Sessions, held at Ipswich on the 4th July instant, before five Justices of the Peace, the case was again heard, and, by consent of the parties, the minutes of evidence taken at the May sittings were also taken as minutes of evidence for the purpose of the cause. The Court caused the following entry to be made:—"Verdict for plaintiff, £9 13s. 3d., plaintiff to pay defendant £9 8s. costs, £3 3s. costs from District Court, £4 4s. professional costs, and £2 witnesses' expenses, and 1s. filing plea." Upon this state of facts the order *nisi* was granted, as in my opinion a *prima facie* case was made out for the issuing of the writ of prohibition.

When cause was shown against the order *nisi* on the 13th instant, a preliminary objection was taken by Mr. Thompson that it ought not to have been granted, on the ground that a writ of prohibition could not be issued to a Court of Petty Sessions, and reference was made to a former decision of mine in Chambers given on an *ex parte* application in a case of Warry and Marsh for a writ of prohibition, and reported in the *Courier* of November 9, 1872. The point having now been fully argued, I have now come to a conclusion that in deciding the case referred to I gave too much weight to a passage in Wilkinson's "Plunkett," p. 449, edition 1866. I think that a writ of prohibition will issue to the justices of a Court of Petty Sessions when they have no jurisdiction, and also when they exceed their jurisdiction, although the Court of Petty Sessions is a Court of Record, and, whether the proceedings be criminal or civil, by the 5th section of the Act 17 Victoria, No. 39, a Judge of the Supreme Court may hear and determine applications for writs of prohibition, directed

to any justice or justices, in all cases where imprisonment shall have been directed, or where the fine awarded, or the amount ordered to be paid, or the value of the matter adjudicated upon, shall not exceed £30. See, further, "*The Small Debts Act of* 1867," sections 1 to 3 inclusive.

I come now to deal with the application on its merits. Mr. Townley, the Police Magistrate of Ipswich, who was the chairman of the Court of Petty Sessions held on July 4, has made an affidavit that the decision of the Court, although apparently for the plaintiff, was virtually for the defendant, but that, as there is no provision in the rules of the Small Debts Court, nor any process by which money can be properly taken out of Court, which has been paid in with pleas, without an order, it has always been the custom, *pro formâ*, to give judgment for money paid into court with pleas as a justification to the Registrar for so paying the same. I am not prepared to say that the custom, which it seems has obtained in this respect, ought to be abandoned, but in future it will be well, for the sake of avoiding expensive litigation, if Courts of Petty Sessions, when they mean to give a verdict for the defendant, will add to the entry of a verdict for the plaintiff for the amount paid into Court, an entry in this wise: "Verdict for the defendant on the whole record," and under the provisions of Section 10 of Act 17 Vict., No. 39, I order that the record in the present case be amended accordingly.

There remains for consideration the question of costs. The Court should have allowed only £2 2s. for professional costs. [*See* "*Small Debts Courts Act of* 1867," *section* 9, *schedule B.*] The hearing of the 2nd of May was abortive, and the hearing properly so-called took place on the 4th of July. £2 witnesses' expenses, also, ought not to have been allowed. No witnesses were called or examined at the hearing on the 4th of July, and the case stands on the same footing in this respect as the admission of facts by parties in a suit. It was to the mutual advantage of the plaintiff and defendant in this case that the evidence that had already been taken on both sides should not be gone through again, and the Justices who heard the case were not in a position to exercise a discretion given them by the second section of "*The Small Debts Courts Act of* 1867 *Amendment Act.*" They could not judge from the demeanour of the witnesses whether they ought to be allowed their costs or not.

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I order, therefore, that the record in this case be further amended by substituting £2 2s. in place of £4 4s. for professional costs, and by striking out £2 for witnesses' expenses. The verdict, as amended, will be for the defendant upon the whole record, with £5 6s. costs. I discharge the order *nisi* for a writ, and make no order as to the costs of the present application.

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Attorney for the Plaintiff: *J. O'Sullivan.*

Attorneys for the Defendants: *Thompson and Hellicar.*

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JACOBS AND OTHERS v. ANDERSON; SAME v. WARWICK.

Practice—Costs—Certificate—Action for sum less than £30—*31 Vic., No.* 20, *ss.* 5, 12; *40 Vic., No.* 6, *Ord.* 13, *R.* 3.

Statement.

UPON judgment being signed for want of appearance, under Order 13, Rule 3, of "*The Judicature Act*, 1876," the Plaintiff is entitled to costs without a certificate, although the amount for which judgment is signed be less than £30, unless the Court or Judge vary the judgment by disallowing costs.

Although the sections 5 to 12 inclusive of "*The Costs Act*, 1867," are virtually repealed by "*The Judicature Act*," the Court or Judge would probably still be guided to a great extent by the spirit of the former Act in granting or disallowing costs, and would, upon application by the defendant, disallow the costs of an action for a sum less than £30 brought in the Supreme Court, which the plaintiff might have brought in an inferior court, unless good grounds are shown for its having been brought in the Supreme Court.

The facts sufficiently appear in the judgment.

The learned Judge mentioned that he had conferred with His Honour the Chief Justice, who concurred in the general effect of the judgment.

Judgment.

LILLEY, J.:—The facts in these cases are alike, and this judgment will govern both of them. The plaintiffs endorsed their writ specially under order 3, rule 6, of "*The Judicature Act*," and signed judgment for want of an appearance under order 13, rule 3, for less than £30. The Registrar, however, refused to allow them to sign for costs, unless they obtained a certificate of the Judge under section 12 of "*The Costs Act of* 1867." The defendants reside in the North, and, in strictness, the action should have been brought in the Northern District Court, or the Court of Petty Sessions for the Police District within which the defendants live. The plaintiffs have applied to

me for my certificate on grounds which it is not necessary to discuss, inasmuch as I have come to the conclusion that a great part of "*The Costs Act of* 1867" has been virtually repealed by "*The Judicature Act*," and especially the sections from 5 to 12 inclusive, which relate to the title to, and amount of, costs. Under order 54 of "*The Judicature Act*," the costs are in the discretion of the "Court," which in this place must be read "the Court or a Judge" (see section 6 of the Act). The exercise of this discretion is, however, varied occasionally by the rules, as, for instance, under this same order 54, where, although costs in general are left to be *allowed* at the discretion of the Court or Judge, they are left to "follow the event" on a trial before a jury, with a discretionary power in the Judge to *disallow* them, on good cause shown at the trial. In like manner, under order 13, rule 3, the plaintiffs are entitled to sign judgment for their debt, and "a sum for costs"—that is, for their costs to be taxed, unless the Court or a Judge shall set aside or vary the judgment, which might be done by *disallowing* the costs in a case which ought not to have been brought in the Supreme Court, but in one of the inferior Courts of the Colony. Although "*The Costs Act of* 1867" has, to the extent I have mentioned, been repealed, a Judge would probably still be guided, in a material degree, by its provisions or spirit in the grant or refusal of costs. And, although "*The Judicature Act*" intends the Court or Judge to follow the equity rule in the disposal of questions as to costs—and it is very firmly established that they shall "follow the event"—unless for some reason the Court or Judge should see fit to make an adverse order, it must be remembered that such reason would be found where the subject-matter of the action in this Court was small and within the jurisdiction of the inferior courts. I may say, therefore, that a plaintiff who resorts to this Court when he might sue in the District or Petty Sessions Courts for a sum under £30 will run the risk of losing his costs should the defendant, within any reasonable time, apply to vary the judgment on that ground. In this case, I can only say that my certificate would be an unnecessary and extra-judicial act; and that the plaintiffs are, without obtaining it, entitled to their costs, unless a hostile application be made to me by the defendant. I may add that, unless the facts on the affidavits before me could be successfully contested, I should probably refuse to deprive the plaintiffs of their costs. The Registrar will therefore permit the plaintiffs to sign judgment for debt and costs.

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WATSON AND OTHERS v. BECKERLEG AND ANOTHER.

Personal Representative—Curator of Intestate Estates.

The Curator of Intestate Estates, who has duly acted as such in the administration of the estate of a person dying in Queensland, is his legal personal representative.

WATSON AND OTHERS v. BECKERLEG AND ANOTHER.

Statement.

This was a Creditors' suit for administration of the real and personal estate of James Beckerleg, deceased, who died intestate. The defendants were the heir-at-law of the intestate and the Curator of Intestate Estates. An affidavit of the Curator was read, which stated that he had administered all the personal estate of the intestate, under an order made by a Judge of the Court, and that it was insufficient to discharge his debts.

The *Attorney-General* (*Beor* with him), for the plaintiff, prayed for the usual decree.

Harding, for the defendant Beckerleg, objected that the personal representative of the deceased was not before the Court.

Judgment.

LUTWYCHE, J.:—The Curator of Intestate Estates is the legal personal representative. Decree as prayed.

Solicitors for the Plaintiff: *Hamilton and Sons*, Toowoomba; by *A. J. Thynne.*

Solicitors for the Defendant: *Dodd*, Toowoomba; by *Daly and Abbott.*

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BYERS AND OTHERS v. ROLLS.

Appeal—Special Case—Gold Fields—38 Vict., No. 11, s.s. 71, 74.

On an appeal from an inferior court to the Supreme Court, the special case should state the questions to be decided.

Proof of the 73rd section of "*The Gold Fields Act*, 1874" having been complied with is not *prima facie* proof that the 71st section has also been complied with.

BYERS AND OTHERS v. ROLLS.

Statement.

Appeal from the decision of the Northern Supreme Court upon an appeal from the Northern District Court.

Beor and *Garrick* for the appellants.

The *Attorney-General* and *Pring, Q.C.*, for the respondent.

Judgment.

COCKLE, C.J.:—First, the Judge of the District Court is to give his report in the shape of a special case; and I think some such form as that which will be found at page 451 of Chitty's Forms of 1862 ought to be followed. That it should be said the questions for the opinion of the Court are, first, so-and-so; second, so-and-so; and that afterwards the alternative form of judgment expected of the Court should also be set out. The

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only question stated by the learned Judge of the Northern District Court for our opinion is, whether, the 73rd section having been complied with, all further inquiry was dispensed with. Answering that question by itself, we simply say that the compliance with that 73rd section did not dispense with further inquiry so far as the matters in the 71st section are concerned. But it is not sufficient to express this opinion, for it may be that behind the other facts glanced at in the special case—so called—there may lie the two questions raised by our brother Sheppard at Bowen, but not raised in the case itself, or not stated, and no opinions asked upon them. I say that behind the facts of the case may lurk the other two questions which Mr. Justice Sheppard says arise in the case; and it may be that a further question may arise respecting the existence or non-existence of proof of the notice, in fact, to the Warden. Under these circumstances, we are unable to decide the question; because the statute requires them to be raised for us, and raised for us they are not. The only order, therefore, which we can make is, that the order of the Supreme Court, Bowen, be rescinded, and that no further order be made by that Court until the case has, on the application of either of the parties, been remitted by the Supreme Court at Bowen to the Northern District Court Judge to be re-stated.

Solicitors for the Appellants: *Morgan*, Cooktown; by *Daly and Abbott.*

Solicitor for the Respondent: *W. H. Wilson.*

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RAFF AND ANOTHER v. JONES AND OTHERS.

Statement.

Mortgage—Redemption—Mortgagee in possession—Insolvency—Official and Creditors' Assignees—Costs—"Insolvency Act, 1864," *ss.* 6, 88, 89, 90.

The Official and Creditors' Assignees under "*The Insolvency Act*, 1864," were not joint tenants, nor could either of them separately transfer any part of the insolvent estate of which they were assignees.

An assignee under "*The Insolvency Act*, 1864," could not delegate his general authority.

C. mortgaged lands to J., and, in August, 1866, assigned the equity of redemption to M., by way of mortgage, with proviso for redemption. In the following month C. became insolvent, and R. afterwards became official assignee, and F. was appointed creditors' assignee of C.'s estate under "*The Insolvency Act*, 1864." J. then took possession of the mortgaged land as mortgagee, and continued in possession and in receipt of the rents and profits till the year 1877. M. proved under the insolvency for the difference between his debt and the value of his security. The assets, including C.'s equity of redemption, were sold by one of the assignees without the concurrence of the other.

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Statement.

Held, that the sale was invalid as to the whole of C.'s interest.

That M. did not, by proving for the difference between his debt and the value of his security, become a purchaser of the equity of redemption, and that the security remained a pledge redeemable by the assignees.

That the case was not one in which the Court would oblige the mortgagee to account for the rents received by him while in possession.

In a suit for redemption of mortgaged lands, the mortgagee will be entitled to his costs, provided his refusal to reconvey upon tender of his principal debt and interest was founded upon a reasonable and *bona fide* doubt of the title of the person claiming to redeem.

Suit for the redemption of a mortgaged estate. The facts sufficiently appear in the judgment.

The *Attorney-General* and *Harding*, for the plaintiffs, cited the following cases and text books:—

Ex parte Griffin, 2 Gl. and J., 114; Doyley *v.* Sherratt, 2 Eq. Cas., Ab., 742; Boursot *v.* Savage, L. R., 2 Eq., 134; Jones *v.* Smith, 1 Hare, 43; Neeson *v.* Clarkson, 2 Ha., 163; Kerr on Fraud, 55; Fisher, sec. 1,540, p. 957, Mortgages; Webb *v.* Rorke, 2 Sch. and Lef., 672; Seton, 399, 400; Incorporated Society *v.* Richards, 1 Drew and W., 287; Powell *v.* Trotter, 1 Drew and Sma. 388; Harmer *v.* Priestley, 16 Beav., 569; Seton, 462; Hoskin *v.* Sincock, 11 Jur., N. S., 477; Lewin, 5th Ed., 210; Fisher, sec. 1,604, 1,608; Coppin *v.* Fernyhough, 2 Bro. c.c. 291; Proctor *v.* Corsser, 2 Drew, 1; Neeson *v.* Clarkson, 2 Ha., 163.

Pring, Q.C., and *Power*, for the defendant Jones, cited—

Thornborough *v.* Baker, 2 Tudor L. C., 973; Hoskins *v.* Clewer, 3 Bea, 130; Powell *v.* Trotter, 1 Drew and Sma., 388; Hoclock *v.* Smith, 1 Coll., C.C., 287; Patch *v.* Wilde, 30 Beav., 99; Neeson *v.* Clarkson, 4 Ha., 104; Fisher on Mortgages, 1,624 p. 895; Davis *v.* May, 19 Ves., 382; Wilson *v.* Metcalfe, 3 Madd. 45; Loftus *v.* Swift, 2 Sch. and Lef., 672; Dekelen *v.* Gale, 7 Ves., 586.

Real, for Maria Costin, cited—

Clavering *v.* Thomas, 5 Ves., 689, citing Jackson *v.* Cuts; Proctor and others *v.* Cooper and others, 2 Drew, 1; Hunsden *v.* Chency, 2 Ves., 150; Raw *v.* Pole, 2 Ves., 239; Draper *v.* Borlase, 2 Ves., 370; Ibbotson *v.* Rhodes, 2 Ves., 554; Beresford *v.* Mil-

ward, 2 Atk., 49; Oliver *v.* King, 8 De G. M. and G., 110; Boursot *v.* Savage, 2 L. R. Eq., 134; Moorcock *v.* Picheiss, Ambler; Fuller *v.* Bennett, 2 Ha., 394; *Ex parte* Jackson, 5 Ves., 357; *Ex parte* Wright, 1, and Chit., 573; *Ex parte* Allison, Fonblanque, 26; Griffith *v.* Holmes, 632.

Attorney-General, in reply—

Hulock *v.* Smith; Patch *v.* Wilde.

Statement.

LILLEY, J.:—In 1862, W. J. Costin being seised of certain land in Brisbane, mortgaged it in fee to one Hughes and the defendant Jones on a joint account; Costin made a further charge to them, amounting, with the original mortgage, to £1,300. He afterwards in August, 1866, assigned his equity of redemption to Isaac Markwell, who had become surety for him to the defendant (Commercial Bank) by way of mortgage, with a proviso for redemption. Hughes has since died, and the legal estate is now in Jones, subject to the equity of redemption, the right to which is contested in this suit. Costin became insolvent in September, 1866, and his estate vested in the Official Assignee, William Pickering (section 88 "*Insolvency Act of* 1864"). At the first meeting of creditors, the plaintiff, Forrest, was elected creditors' assignee; the election was confirmed, and the estate then vested in him jointly with the Official Assignee (sec. 89) The equity of redemption of the mortgaged estate was inserted in his schedule by W. J. Costin as an asset. The defendants, Jones and Hughes, entered into possession of the property, but did not prove under the insolvency, and nothing was done by the assignees to realise the insolvent's interest for the benefit of the creditors. Jones has continued mortgagee in possession, and in receipt of the rents and profits up to the present time. Markwell proved contingently under the insolvency, and valued his security at £1,000, his proof being for a deficiency. Markwell became ultimately liable to pay for Costin only one promissory note, and assigned his interest in the property to the defendant Bank, subject to redemption. He has paid not more than £100, if he has paid even that sum, in respect of his suretyship for Costin. Pickering died in March, 1868, and the plaintiff Raff was appointed in his stead as Official Assignee, and the estate then vested in him jointly with the plaintiff Forrest (sec. 6 and latter part of sec. 89). Raff seems to have been led by an examination of Pickering's books to conclude that the whole estate had been disposed of, but he must be taken by me to have

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had notice of the existence of the equity of redemption as a possible asset. Pickering before his death had sold other real estate to Miskin, who took no transfer, and Raff from time to time executed alone, without the concurrence of Forrest and without his knowledge, conveyances in favour of sub-purchasers from Miskin. In May or June, 1876, the defendant, Maria Costin, purchased the remaining allotments from Miskin, and immediately entered into negotiations with Raff through her solicitor Murphy and W. J. Costin for the purchase of the "remaining assets" in the insolvent estate, and a bargain was concluded at the price of £5 5s. Raff executed to the defendant, Maria Costin, a deed dated the 12th July, 1876, in which he described himself as "official and sole assignee," and conveyed to her "all the real and personal estate, equities of redemption, &c., and all assets, &c., forming the whole or any part of the estate of W. J. Costin." There is no particular description in this deed of any part of the property or assets. Raff asserts that he believed he was transferring merely the remainder of Miskin's purchase, and was in entire ignorance of the existence of the equity of redemption in the mortgaged estate in Jones' possession. Forrest knew nothing of the negotiations between Raff and Maria Costin, nor of the deed of the 12th July, 1876, until the 30th October following, on which day he instructed his solicitor to take steps to protect the interests of the creditors.

On the 3rd August, 1876, Maria Costin obtained an assignment by deed-poll from Isaac Markwell in consideration of £100 recited to have been paid, but which she merely promised to pay to him.

Under this last-mentioned instrument and Raff's deed of the 12th July, 1876, she claims to be absolutely entitled to the equity of redemption of the mortgaged estate in the possession of Jones. On the other hand, the plaintiffs Raff and Forrest seek a declaration that they are entitled to redeem, inasmuch as Raff's deed was unauthorised, was a breach of trust and inoperative, but, if effectual to pass the estate, was executed under such circumstances as entitle them to have it declared void and to have it set aside.

The first question to be decided is whether Raff's deed was effectual to pass the whole estate? If it is, it must rest upon either a general or particular delegation of authority. An assignee in insolvency cannot delegate his general authority to his colleague (Douglas *v.* Brown, 1 Mont. 93)—that would be to

appoint or substitute a new assignee, which the Court only can do. An authority to act by deed must be created by deed. In the absence of authority so given, one of the assignees could have no power at law to execute a deed transferring the whole interest in the estate (Harrison *v.* Jackson, 7 T.R. 207; Steiglitz *v.* Eggington, 1 Holt N.P. 141; and Williams *v.* Walsby, 4 Esp., 220). If such authority could be assumed by the Official Assignee, the purpose of appointing a Creditors' Assignee, which is for the protection of the interests of the creditors, might be defeated. Moreover, throughout our "*Insolvency Act of* 1864," the powers and authorities are given to the "assignees" without any words of severance. It has been suggested by plaintiffs' counsel, but not pressed or argued by counsel for defendant, that Maria Costin might take a moiety of the estate, or Raff's interest in it, by the conversion into severalty of some supposed estate of joint tenancy in the assignees. A joint tenancy is *created* only by deed or devise, and so arises either by *grant* or *purchase*—that is, by the act of the parties: it never arises by the mere act of law, and so it does not come by descent or succession (2 Bla. Com. by Christian 179, and Watkins' Conveyancing, 152); the estate of the assignees (Raff and Forrest) vested in them by force of the statute by operation of law, and would pass to their successors if any were ever appointed (see sections 6, 88, and 89 of the Act). They took the estate which the insolvent had at the time of his insolvency for the purpose of sale and distribution amongst his creditors, but they did not take as joint tenants. Raff, therefore, could not pass to Maria Costin any interest severable from that of his co-assignee Forrest. She must therefore take the whole or none. As Forrest could make no delegation of his general authority as assignee, and gave no express particular power to sell the equity or to execute the deed of 12th July, 1876, and as Raff could not convey a part, it follows that, as an instrument capable of passing at law either the whole or a part of the estate of the assignees in the mortgaged property, it was inoperative. The defendant Maria Costin insists, nevertheless, that it is effectual in equity, if not at law, because Forrest by his conduct has precluded himself from denying the deed of Raff to be the deed of both. It is shown that in the lifetime of Pickering a portion of the insolvent's property had been advertised for sale "by order of the Official Assignee." Supposing Forrest to have seen the newspaper, it

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might prove at most that he had permitted that particular act to be done, but as showing that he had given a general authority to Pickering to act without him it would prove nothing, and would, as we have seen, be of no effect even if it proved so much. Nor had it any connection with the property which is the subject-matter of this litigation. Forrest has not denied defendant Costin's statement that he allowed Pickering to act as sole assignee. It seems that he did not interfere with Pickering's administration; but that cannot deprive him of the right to interpose when the interests of the creditors require him to do so. It is further pressed upon me that Forrest must have known of the conveyances by Raff alone to Miskin's sub-purchasers, but this he explicitly denies; and even if he had admitted it, however effectual it might have been to protect those purchasers, it could not amount to a valid general delegation, and was not an express authority touching the sale of the equity or the deed of 12th July, 1876. Forrest has directly denied that he knew Raff was acting as sole assignee, or had made the deed of July, 1876—and I believe him. He is also confirmed by Raff's testimony that he himself was not aware there was any creditors' assignee. I find, therefore, that Forrest, in fact, gave neither general nor particular authority to Raff to execute the deed of the 12th July, 1876, and that his acts and conduct did not give either previous sanction or subsequent confirmation to it. There was never anything like acquiescence by Forrest. Raff's deed was consequently a breach of trust, and the defendant Maria Costin's title, so far as it is supposed to rest on his deed, cannot stand. A deed would not be necessary to pass the right of redemption in equity if there were a sufficient contract otherwise, but there must be authority in the vendor to support it. I should be satisfied to rest my decision as to Raff's deed on the conclusions already stated by me, but the plaintiffs have urged one or two other topics which I must consider and decide. They say that the deed was fraudulent because defendant Costin concealed from Raff that he was selling the equity of redemption, and so obtained it at a grossly inadequate price. I think it is clear that Raff, with this particular asset in the schedule, must be held responsible for, and be taken to have had knowledge that he was selling it when he sold the "remaining assets;" and although a sale by a trustee for a grossly inadequate value would be evidence of fraud, it must not be forgotten that the charges upon the property were at that time unknown quantities which

have only been discovered since the beginning of this suit, and that there was no certainty that the property might be acquired without great expense and litigation. I think, also, that there was nothing in the nature of mistake entitling the plaintiffs to relief. The case lacks all the elements of mistake; with Raff's knowledge actual or imputed, and with the actual knowledge of the defendant Maria Costin that she was buying the assignee's rights, there was no mistake, and beyond any reasonable doubt no *mutual* mistake, for we find her taking a sale or gift from Markwell on the 3rd August, within three weeks of the 12th July, and in September her agent W. J. Costin tried to get the legal estate from defendant Jones. She clearly knew she was buying the equity of redemption from Raff. The defendant Costin insists that without Raff's deed she has a good title under Markwell's deed-poll of August, 1876; that he conveyed the equity of redemption to her which had been mortgaged to him by Costin, and that he did so in exercise of the power of sale, and so extinguished it. The deed contains no evidence of this latter fact, and it would have been a fraud on the defendant Bank if he had done so, because in July, 1867, he had assigned to them his mortgage with all his rights and remedies under it. The construction of the deed-poll is, however, very simple. It is an assignment of Markwell's mortgage debt (if any) with the accessory security for it, and is in truth merely a transfer to Maria Costin of Markwell's right to redeem his pledge from the Bank, and of any sums he may have paid on account towards that object. She will therefore be entitled to be paid to the same extent that Markwell would on a redemption from him. The deed was not and could not be an absolute sale of W. J. Costin's equity of redemption or of that of his assignees. But it is contended that Markwell was not himself a mere mortgagee—that he became a purchaser when he valued his security, and deducting it proved for the balance of his liability as surety. There is nothing in "*The Insolvency Act of* 1864" to justify such a claim. Section 129 gives a creditor who has an insufficient security the right to receive dividends on the difference between the amount of his debt and the value of his security, but this last remains a pledge redeemable by the assignees. The section is entirely for the benefit of the creditor, and does not deprive the assignees of their rights. The consequent claim to priority by registration which the defendant Costin has made is unimportant if she was not a purchaser, because it is conceded to her

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as mortgagee in right of Markwell. But even if she were a purchaser she had "notice of the insolvency" in Raff's deed, and could not displace the title of the assignees under section 90 of the Act. The defendant Maria Costin claims, however, to be under some of the instruments a *bona fide* purchaser for value without notice of Forrest's title. I have disposed of her position as purchaser, and, I think, she had constructive notice that Forrest was assignee. She had actual notice of the insolvency in Raff's deed, and that he was assuming to act as "sole" assignee, which she must be taken to have known in law was essential to give her a title from him when he acted alone. She was thus put upon inquiry, and by a search in the proceedings in Costin's insolvency she would have found the record of Forrest's appointment and confirmation. Her own solicitor, too, prepared the deed describing Raff as "sole" assignee. She must be held, therefore, to have had notice of a circumstance which she might have ascertained by the exercise of ordinary prudence and business precaution. I do not think the facts sufficient to charge her with notice through Mr. Murphy. This being my view of her case as to notice, it is not necessary to dwell minutely on the facts tending to show constructive notice through her agent, W. J. Costin. He swears he *never knew* that Forrest was creditors' assignee, and, although I think that is improbable, his statement is one which a person who had entirely forgotten the circumstance might well have made. It appears, also, that in respect of the Hill End Estate, where he could have no reason, that I can see, to take titles on defendant Costin's behalf from Raff alone, he acted seemingly in entire ignorance of Forrest's assigneeship. We may impute to the defendant knowledge which her agent may reasonably be believed to remember, but we cannot hold her responsible for his memory or for circumstances which he has forgotten. There will be a declaration that the plaintiffs are entitled to redeem. The defendant Bank and the defendant Jones are entitled to the benefit of their securities. In the case of the defendant Jones, however, the plaintiffs claim that the account should be taken with rents—that the excess of rents after payment of the interest may go towards sinking the principal. The account is generally ordered to be taken with rests when there is no interest in arrear—when the mortgagee takes possession; but the rule is not inflexible, and where other circumstances justify or require the mortgagee for the protection of the estate to take possession,

it may be ordered otherwise. All the circumstances must be regarded, and in this case the mortgagee was compelled to take possession by the insolvency of the mortgagor; the assignees seem to have abandoned the property not formally, but in fact, as insufficient to satisfy the charges upon it, and, after an ineffectual attempt to sell it, it was left for ten years in the possession of the mortgagee as owner. I think it would not be equitable to make him now liable as a receiver in past years of his principal in driblets which he could not profitably reinvest, and which he was encouraged to believe was income and not capital. Moreover, as between the assignees and a secured creditor, the interest may be said to be always in arrear, because the assignees have a right to anticipate the time agreed upon for redemption, and to make the mortgagee receive his money at a time when it may be difficult to find a new investment (sec. 96 of the Act). He may also prove for his principal and interest under the insolvency at once, deducting the value of his security. There will be no rests. The ordinary decree for redemption would give the mortgagee his costs, but the plaintiffs insist that the defendant Jones has so conducted himself that he should pay costs, or at least have his own disallowed. It is shown that a sum supposed to be sufficient to pay off his debt, with six months' interest in lieu of notice, was tendered to him by the plaintiffs, and that he refused to accept it, alleging that his deceased co-trustee Hughes had purchased the equity of redemption at auction in Brisbane. This would, of course, be a fraud; and there is no proof that Hughes did so. But Jones believed he had acquired the equity of redemption fairly, and all the parties interested by their conduct had allowed that belief to remain undisturbed. When asked for accounts he said he had kept none (I suppose he meant as mortgagee), which is not surprising considering his long possession without a claim. It appears, however, that accounts have been kept by Hughes' family. When a reconveyance to the plaintiffs was tendered to Jones for execution he refused to sign it, giving the same reasons that he had on the tender being made to him. In all the cases where a mortgagee has lost his costs or been ordered to pay costs, his conduct has been vexatious or oppressive. The refusal to accept a tender of the money due to him, and to reconvey where the right of the party tendering is clear and indisputable, or the assertion in the suit of an unfounded right to the property by the mortgagee, would be fit cases for the payment

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of costs; and it is only in such cases, so far as I can discover, that he has been ordered to pay them. I think it is clearly shown that in September, 1876, before Jones knew that the plaintiffs were trying to redeem, he knew from W. J. Costin, who visited Rockhampton, that the equity of redemption had been purchased by Maria Costin;—this was before the tender either of the money or the re-conveyance. To accede to the plaintiff's request might have exposed him to litigation with the defendant Costin; and although it must have been at last unsuccessful, yet in judging of conduct with a penal consequence in view, I must regard the conduct of one of the plaintiffs, who by his own deed and breach of trust had subjected his title to serious contest and difficulty. The plaintiffs ought to have told Jones of the existence of Raff's deed. The defendant Jones had not a clear way before him to accept the tender, his conduct was not vexatious or oppressive, he has submitted to account, and there must be in his case, also, the ordinary decree for redemption with his costs and all just allowances. The defendant Maria Costin, however, who has persisted in the assertion of an unfounded claim, must pay costs of the suit, limited to the contest between herself and the plaintiffs. She may set off against costs the £5 5s. paid to Raff, and any sum that may upon an inquiry be found to be due to her in right of Markwell's deed-poll.

Declare the deed of 12th July, 1876 to be void. Order it to be set aside as to the property in the pleadings. The rest of the decree will be according to the prayer of the Bill, modified by my judgment.

Solicitors for the Plaintiffs: *Hart and Flower.*

Solicitors for Defendant Jones: *Rees R. Jones and Brown.*

Solicitor for the Commercial Bank: *P. Macpherson.*

Solicitor for Maria Costin: *W. E. Murphy.*

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Re WILDASH AND KENNETH HUTCHISON, INSOLVENTS. —*Ex parte* MISKIN.

Insolvency—Equitable Mortgage—Priorities—Fraudulent Preference—Caveat —"Insolvency Act, 1874," *ss.* 87, 107, 108, 109—"*Real Property Act,* 1861," *ss.* 9, 43, 44, 56, 99, 101, 102.

W. and K. H., partners and conditional lessees of certain lands in Queensland, transferred their leases to G. H. in the year 1875. G. H. was ignorant of the transfer, W. acting for him under a general power of attorney. The balance of the rents was subsequently paid, it did not appear by whom, and Crown grants of the lands were issued to G. H. In April, 1876, the lands were transferred from G. H. to A. H. without the knowledge of either of them, W. acting for G. H., and the solicitor for all the parties acting under a general power of attorney for A. H. It did not appear that any consideration passed. In September, 1876, W. and K. H. became insolvent, and in January, 1877, obtained their certificates of discharge. On June 5th, 1877, the deeds relating to the lands were deposited by A. H.'s attorney in the Joint Stock Bank to cover an advance to W. and K. H. On June 16th, 1877, the Official Trustee in Insolvency entered a *caveat* in the Real Property Office against any dealings with the land. The advance was not made by the Bank until June 25th.

Held, that the transfer to G. H. and subsequent dealings with the land were fraudulent and void under the 55th, 107th, 108th, 109th sections of "*The Insolvency Act,* 1874."

Held also, that "*The Real Property Act*" does not invalidate equitable mortgages by deposit.

That the Trustee by lodging the *caveat* had protected his claim against all subsequent transactions, and that his claim was therefore prior to and must prevail over that of the Bank.

Statement.

THE Insolvents were the proprietors of a station in the neighbourhood of Warwick, and were conditional lessees of certain portions of land on or adjoining their stations. In the year 1875 they transferred the leases to George Hutchison, a brother of Kenneth Hutchison, but without the knowledge of George Hutchison, the matter being conducted on his behalf by Wildash, who held a general power of attorney from him. The balance of rents was subsequently paid, but by whom it did not appear, and Crown grants of the lands were issued to George Hutchison. The lands were afterwards, in April, 1876, transferred from George to Alexander Hutchison, also a brother of Kenneth Hutchison, and a creditor of the firm of Wildash and Hutchison. The transfer was made without the knowledge of either George or Alexander Hutchison, Wildash acting for the former, and the solicitor for all the parties acting under a general power of attorney for Alexander. It did not appear that any consideration passed from Alexander to George Hutchison. In September, 1876, Wildash and Kenneth Hutchison became insolvent, and obtained

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their discharge in January or February, 1877. On the 5th of June, 1877, the certificates of title to the land were deposited by Alexander Hutchison's attorney in the Joint Stock Bank to cover an advance to Wildash and Kenneth Hutchison. The advance was made on the 25th of June. In the meanwhile the trustee of the insolvent estate of Wildash and Kenneth Hutchison had, on the 16th of June, entered a *caveat* in the Real Property Office against any dealings with the land.

The *Attorney-General* and *Harding* moved, on behalf of the Trustee, to have the transfers to George Hutchison and Alexander Hutchison set aside.

They cited the following cases and authorities:—

Newton *v.* Newton, 6 Eq. 135, 4 Ch. 143; Cory *v.* Eyre, 1 De. J. and S. 149; Thorpe *v.* Holdsworth, LR. 7, Eq. 139; Phillips *v.* Phillips, 31 LJ., Ch. 321; Parker *v.* Clarke, 30 Bear 54; Russell *v.* Russell, 1 White and Tudor, 674; Lange *v.* Ruevoldt; Hughes *v.* Morris, 2 De G. M. and G., 355.

Garrick, for Alexander Hutchison, cited:—

Ex parte Blackburn, LR. 12 Eq., 358; *Ex parte* Topham, LR. 8 Ch., 614.

Pring, Q.C., and *Beor*, for the Joint Stock Bank, cited:—

Ex parte Ainsworth and Goren, 1 Mont. and A. 457; *Ex parte* Bolland, 7 Ch. App. 24.; Hunter *v.* Walters, 11 LR. Eq. 292.

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LILLEY, J.:—The motion asks to set aside certain instruments as void against the official trustee, &c., &c., on the ground that they are fraudulent preferences. (Here his Honour stated the facts relating to the deeds of 29th August, Crown grants, and certificates of title, and deposit with the Bank.) What is the result of these transactions? At the beginning the insolvents are possessed of the property. Long (for years) before, and at the time of the act of insolvency, they were the lessees under the Crown. Then by transfers, of which the transferee, Geo. R. Hutchison, was entirely ignorant, they divested themselves of their leases. Of the object of those transfers they gave contradictory and unreliable accounts. The balance of rents is afterwards paid by someone, we know not by whom, and Crown grants are issued in the name of Geo. R. Hutchison. He knows nothing of these or of his estate in the lands. Then a memorandum of conveyance under the Real Property Act is made from him to the respondent, Alexander R. Hutchison.

George knows nothing of this, and he receives none of the alleged consideration money and no account of it from Wildash or anybody. Alexander, too, knows nothing of the transfers, of the memorandum of conveyance, of the purchase of the land for him, nor that any part of the £2,000 given to Liddle went to George, or was ever intended to go to him. All these affairs were negotiated, deeds signed, and moneys passed between the insolvents, Wildash and Hutchison, and their solicitor, Liddle, without the knowledge of the persons who were mainly interested—the young Hutchisons—by means of powers of attorney to Wildash and Liddle; and at the end of five months, after the insolvents get their certificates of discharge, we find the certificates of title of what were ostensibly Alexander R. Hutchison's lands pledged to the Bank by Liddle without Alexander's knowledge or authority, with a memorandum of deposit for moneys advanced to the insolvents, Wildash and Hutchison. This was done after notice to Liddle, who was also solicitor for Alexander R. Hutchison, that the official trustee claimed the lands. There is nothing before me to displace the evidence that Alexander R. Hutchison was a creditor. His moneys have most probably been received and used by the insolvents, or one of them, but there is no reliable evidence to connect the payments with the purchase of these lands. The proper conclusion seems beyond reasonable doubt that the insolvents fraudulently divested themselves of the ownership of these lands in favour of a person who seems to have been a creditor. I decide nothing to the prejudice of Alexander's rights (if any) under the deed of 3rd April, 1876, except that it will not support the subsequent dealings with the land. I think, therefore, all these transactions were fraudulent and void, whether we look to the 107th, 108th, or 109th sections of the Act. The Bank claim, however, that they are within the exceptions to sections 107 and 108, as "incumbrancers in good faith and for valuable consideration" (section 107), and as "mortgagees who had not at the time of such mortgage notice of such fraudulent preference" (section 108). The decision on this point depends in part on the answer to the question raised: can there be an equitable mortgage by deposit of instruments under "*The Real Property Act*"? There is nothing in the Act to lead me to the conclusion that equitable estates and interests cannot be created and exist in land outside the Act. The purpose of the Act is to give persons dealing with the registered owner under its forms and safeguards, as far as it can,

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an indefeasible title by registration. Dealing with the registered proprietor in pursuance of the Act, and in the absence of fraud or of any impediments expressly created by the Act itself, your title is safe. But the statute recognises the existence of trusts (sections 77, 78, and 79, and following sections), and allows the instrument declaring them to be deposited with the Registrar-General. They are not, however, allowed to prevent the transfer or other dealing with the estate by the registered trustee (sections 79, 80, and 81). All the old estates and interests are recognised by the Act—estates tail (section 26), remainder (section 36), reversions (section 47), estates for years (section 52), estates in fee simple (section 53), joint tenancy (sections 40 and 82), a beneficiary not registered (section 84), life estates (section 36), co-parceners and tenants in common (sections 40, 92), &c., &c. When the statute means to exclude the incidence of an equitable interest, it does so by express words, as in section 97, where it declares that no vendor of land under the provisions of the Act shall be entitled to an equitable lien thereon for his unpaid purchase money; and I think section 95—as to omitting endorsements on the certificate of title—provides, by publication, for the protection not only of the registered proprietor, but of all persons dealing with the land. The Act recognises specific performance of a contract for purchase of land under the Act, no provision being made for the contract being a registered transaction (section 96). We have, also, estates arising through natural causes, such as death, and also by operation of law, as in insolvency; and the Act recognises them, and provides for transmission. Examples might be multiplied by a diligent search through the patchwork of this ill-drawn statute to show that there was no intention to destroy legal and equitable interests outside the Act. There is nothing in the Act to justify the belief that the Legislature intended to introduce into our Real Property law the rigid rule of our Shipping Acts, that there can be no title or interest outside the register. If such is the policy of the Act, let it be explicitly declared and the whole statute recast. I have been referred, in support of the view that there cannot be an equitable mortgage by deposit, to the repealing clause of the Act, which abrogates all "laws, &c.," so far as regards their application to land under the provisions of this Act; but that is controlled by the context, "so far as they may be inconsistent with the provisions of this Act." Section 43 is also relied on (His Honour reads it). There is nothing in that

or in the statute expressly requiring estates to be *created* by nstrument. That section appears to me not to exclude equitable interests, but to relate solely to the passing of the legal estate, security, or interest under the Act, and to require them to pass by instruments capable of registration, where an instrument is used—but, perhaps, not necessarily by instruments in the form required by the Act (see interpretation clause—"instrument"). A security might be created by *deed*, *assurance*, or *will*. Now, the forms in the Act are not to be inevitably deeds (sec. 9), and there is nothing restricting or controlling a disposition by will. And section 44, also, shows that there may be estates or interests outside the certificate of title in lands which are under the Act, but which are overridden or displaced by a *bona fide* certificate of title. Section 56 prescribes the mode of mortgaging or encumbering the legal estate in lands under the Act, prescribes the form, but contains no words invalidating an equitable mortgage. It seems to me the Legislature would have used express words if it had been intended to destroy a right so long and firmly established as that of pledging the title-deeds of land. I adopt the language of Kindersley, V.C., in Price *v.* Bury (2 Drew. 42), in describing the effect of a mere deposit:—"By the deposit, the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee." There is nothing in "*The Real Property Act*" inconsistent with the validity of this class of security. The statute does not create *new* estates and interests in land, nor does it abolish the old, except the vendor's lien; it does, however, create a vast practical change—it gives paramount title to the registered proprietor, and prior title to dealings in pursuance of the Act. Unless, therefore, an equitable encumbrance is protected by caveat, its practical value as a security is very doubtful, and it is not to be commended as a mode of investment. In this case there is a promise to give a bill of mortgage, but no caveat on the Bank's behalf on the register. There can be no doubt that the Bank were encumbrancers in good faith, and for valuable consideration, and that they had no notice of the fraudulent preference, or of the notice to Alexander Hutchison. The last and most important question now remains: has the official trustee secured priority of title over the Bank, either by the notice of his title in December, 1876, to Alexander Hutchison, through his solicitor or by caveat, under "*The Real Property Act*"?

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The estate and rights of the insolvents at the time of the fraudulent transfers were vested in him by force of the second section of "*The Crown Lands Alienation Act of* 1875," and of "*The Insolvency Act of* 1874," section 87, subsection 4. It is contended for the official trustee that the notice made Alexander a trustee for him, and that, his equity being equal to that of the Bank, must prevail, as it arose prior in time. In all the cases cited, beginning with Manningford *v.* Toleman (1 Coll. 670), none of the rights or equities arose out of statute or had any statutory protection. In this case, on the contrary, the official trustee, and all his estates, rights, and equities, are the creatures of the Act, and limited by its conditions and circumscription. Outside the statute the whole body of the creditors have no equity against a single creditor, and the trustee is in the same position. The notice could not enlarge his title, which depended on the transactions being fraudulent preferences under the Act, and not within the protection to innocent encumbrancers. The notice, therefore, and the authorities cited in aid of it, will not avail anything for the official trustee. There has been nothing in his conduct, had other things been equal, to deprive him of his right to his equity. Has the caveat, then, given him a priority? Dates now become exceedingly important. The caveat, which I assume was absolute (sections 98, 102), was entered on the 16th June, and the Bank made no advance until the 25th June. Until that date they had, therefore, not complied with all the conditions of "*The Insolvency Act*" necessary for their protection, as innocent incumbrancers, and they had taken no steps by caveat or otherwise to protect their interest under "*The Real Property Act*," although the deeds were deposited with them on the 5th June. What, then, is the effect of the official trustee's caveat? By section 9 it forbids the registration of any instrument until after notice of intention to register—"no instrument affecting the land, estate, or interest, shall be registered whilst the caveat remains in force" (section 101). And, according to the "nature of the estate, interest, or claim," it entitles the caveator to forbid the sale or mortgage or other dealing with the land, estate, "or interest" (section 102). Certain "claims, rights, titles, or interests" may be "notified or protected" by entry in the register (section 99). Trusts do not seem to be protected, even when notified. The only entry that can notify or protect a claim seems to be a caveat. I think a caveat is not actual or constructive notice to all the world of a claim, and the

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statute itself makes provision for actual notice to the person whose estate it affects (section 99). The caveat, however, prohibits any subsequent dealing under the Act, and with greater force outside the Act, in derogation of the claim it protects, if it is well founded. The official trustee had consequently a title prior to that of the Bank, and Alexander Hutchison will be declared to be a trustee for him. There will be other declarations in accordance with my judgment, and an order to vest the selections in the official trustee. The official trustee's costs, including his costs against the Bank, to be paid by the respondent.

Solicitors for the Trustee: *Little and Browne.*

Solicitors for Alexander Hutchison: *Roberts, Liddle, and Roberts.*

Solicitors for the Joint Stock Bank: *Daly and Abbott.*

RE GEORGE HAUGHTON.

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Re GEORGE HAUGHTON.

Statement.

Prohibition—Illegally using Cattle—17 Vict., No. 3, s. 6.

To support a conviction for illegally using an animal under sec. 6 of 17 Vict., No. 3, it must appear that the animal was used for the profit, convenience, or pleasure of the party using it.

Garrick, on behalf of George Haughton, moved for a Writ of Prohibition against a conviction of Haughton by Thomas John Sadlier, Police Magistrate of Tambo.

The *Attorney-General* appeared in support of the conviction.

Judgment.

LUTWYCHE, J., delivered the judgment of the Court.

In this case, as we are all agreed upon the second ground on which the rule was obtained, it will not be necessary for me to say anything about the first. With regard to the second ground of the objection to the conviction, which is that there was no evidence to support the conviction, I think that, after the very careful investigation that the Court has made of the evidence, that the learned counsel, Mr. Garrick, who appeared on behalf of the prisoner Haughton, is right. To support a conviction for illegally using an animal under the 6th section of 17 Vic., No. 3, it must appear that the animal was used for the profit, convenience, or pleasure of the party using it—that was the definition which I gave in my construction of the meaning of the statute in the case of Emmerson *v.* Clarke and Others, which was reported in the *Brisbane Courier* of September 13th, 1872. Now, in this case I am unable to see that there is any evidence to show

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that Haughton used the mare in question for his own profit, pleasure, or convenience. So far as I have been able to form a judgment on the facts of the case, the animal was at one time in the course of the present year the property of Haughton. It was sold by him to Lacy, it appears, in this way, that he gave Lacy the right to sell any horses belonging to him. Then it appears that, in April of the present year, Lacy sold a number of horses which had been running the mail on the Charleville line to Solomon and Bredhauer. This mare in question was, as late as July of the present year, running at large, and a day or two afterwards was, by the order of Haughton, driven by Williams to his place at Nive. A week after that he, accompanied by Lacy, came to the paddock and assisted him in catching the mare, which was then mounted by Williams. But there is no evidence in the case from which it can possibly be inferred that Haughton was aware of the sale by Lacy to Solomon and his partner of the animal in question. Then, if Haughton did not know of the sale to Solomon, but was aware that he had given Lacy authority to sell any horse belonging to him, he might, and no doubt did, reasonably infer that Lacy was desirous of selling this mare which was included in the terms of the contract between himself and Lacy, and it seems to me to be a very natural course of conduct for him to tell Lacy where the mare was, to point her out, to assist in catching her, and let her be used by the owner. Therefore he cannot be said to have illegally used the mare, not having done so for his own profit, convenience, or pleasure. Therefore I think the conviction must be quashed.

Rule absolute.

Solicitor for the Crown: *The Crown Solicitor.*

Solicitors for George Haughton: *Daly and Abbott.*

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An assignee under "*The Insolvency Act*, 1864," could not delegate his general authority.

C. mortgaged lands to J., and, in August, 1866, assigned the equity of redemption to M., by way of mortgage, with proviso for redemption. In the following month C. became insolvent, and R. afterwards became official assignee, and F. was appointed creditors' assignee of C.'s estate under "*The Insolvency Act*, 1864." J. then took possession of the mortgaged land as mortgagee, and continued in possession and in receipt of the rents and profits till the year 1877. M. proved under the insolvency for the difference between his debt and the value of his security. The assets, including C.'s equity of redemption, were sold by one of the assignees without the concurrence of the other.

Held, that the sale was invalid as to the whole of C.'s interest.

That M. did not, by proving for the difference between his debt and the value of his security, become a purchaser of the equity of redemption, and that the security remained a pledge redeemable by the assignees.

That the case was not one in which the Court would oblige the mortgagee to account for the rents received by him while in possession.—RAFF AND ANOTHER *v.* JONES AND OTHERS 37
3. *Equitable Mortgage—Priorities—Fraudulent preference—Caveat—* "*Insolvency Act*, 1874," *ss.* 87, 107, 108, 109—"*Real Property Act*, 1861, *ss.* 9, 43, 44, 56, 99, 101, 102.] W. and K. H., partners and conditional lessees of certain lands in Queensland, transferred their leases to G. H. in the year 1875. G. H. was

INSOLVENCY—*continued.*

ignorant of the transfer, W. acting for him under a general power of attorney. The balance of the rents was subsequently paid, it did not appear by whom, and Crown grants of the lands were issued to G. H. In April, 1876, the lands were transferred from G. H. to A. H. without the knowledge of either of them, W. acting for G. H., and the solicitor for all the parties acting under a general power of attorney for A. H. It did not appear that any consideration passed. In September, 1876, W. and K. H. became insolvent, and in January, 1877, obtained their certificates of discharge. On June 5th, 1877, the deeds relating to the lands were deposited by A. H.'s attorney in the Joint Stock Bank to cover an advance to W. and K. H. On June 16th, 1877, the Official Trustee in Insolvency entered a *caveat* in the Real Property Office against any dealings with the land. The advance was not made by the Bank until June 25th.

Held, that the transfer to G. H. and subsequent dealings with the land were fraudulent and void under the 55th, 107th, 108th, 109th sections of "*The Insolvency Act*, 1874."

Held, also, that "*The Real Property Act*" does not invalidate equitable mortgages by deposit.

That the Trustee by lodging the *caveat* had protected his claim against all subsequent transactions, and that his claim was therefore prior to and must prevail over that of the Bank.—*Re* WILDASH AND HUTCHISON—*Ex parte* MISKIN 47

INTESTATE.—

1. *Administration—Foreign Court.*] "*The Judicature Act*" does not necessarily require that all contentious proceedings in Probate should be by way of action. The Court may, upon motion, direct issues to be tried when the proceedings have not assumed the form of an action.

A plaintiff who has obtained in a foreign court a decree for an account against a defendant who has since died intestate, leaving property in Queensland, has a right to ask that an Administrator should be appointed here.

Semble: If the personal representative declines to administer, the applicant will not be appointed Administrator, but the Curator of Intestate Estates will be appointed.—*In re* THOMAS PERKINS, deceased 24
2. *Personal Representative—Curator of Intestate Estates.*] The Curator of Intestate Estates, who has duly acted as such in the administration of the estate of a person dying in Queensland, is his legal personal representative.—WATSON AND OTHERS *v.* BECKERLEG AND ANOTHER 36

"*JUDICATURE ACT*."—
See PRACTICE 1

JURISDICTION.—
See JUSTICES 1

JUSTICES.—
1. *Jurisdiction. See* SMALL DEBTS.
2. *Mandamus. See* MUNICIPALITY.
3. *Prohibition—Police Magistrate—Hearing of Case—Illegal Employment of Polynesian Labourer—Evidence—Onus of Proof*—31 *Vic., No.* 47, *ss.* 23, 24; 11 *and* 12 *Vic., c.* 43, *s.* 14.] Upon an information charging the Defendant with having employed a Polynesian labourer otherwise than under the Regulations of "*The Polynesian Labourers Act*, 1868," without reporting the same to the nearest bench of magistrates, it is for the prosecution to show that the report was not made.

A Police Magistrate, while engaged in hearing a case, left the bench in order to give evidence, when his place was taken by a justice of the peace. Upon the completion of his evidence the Police Magistrate returned to the Bench, and continued the hearing of the case, and made an order.

Held, that the proceedings were irregular, the case not having been heard either by a police magistrate or by two justices of the peace, as directed by the Act.—PAUL *v.* BUTTENSHAW AND OTHERS 4

LAND.—
See SALE.

MANDAMUS.—
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MORTGAGE.—
See INSOLVENCY 2, 3
WILL.

MORTGAGEE—*Costs of.*] In a suit for redemption of mortgaged lands, the mortgagee will be entitled to his costs, provided his refusal to reconvey upon tender of his principal debt and interest was founded upon a reasonable and *bonâ fide* doubt of the title of the person claiming to redeem.—RAFF AND ANOTHER *v.* JONES AND OTHERS 37

MUNICIPALITY.—*Mandamus—Justices—Appeal—Rating*—28 *Vic., No.* 21, *sec.* 79.] Lands and houses in a municipality having been assessed by the Municipal Council at a certain sum, and the assessment entered in the assessment book of the Council, the amount was afterwards altered without their authority, and notice of assessment of the property, at the substituted amount, served upon the owner. The owner appealed against the assessment, and the Justices, having heard evidence disclosing the above facts, decided

MUNICIPALITY—*continued.*
that the assessment—notice of which was served upon the owner—was not the assessment of the Council, and declined to proceed any further with the inquiry.

Held, that there was no ground for a *mandamus* to compel the justices to hear and determine the appeal.—THE QUEEN *v.* TOWNLEY AND OTHERS 21

PASTORAL LEASES.—
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"*REAL PROPERTY ACT*."—
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See SALE.

SALE.—
See INSOLVENCY.
SHERIFF.
SPECIFIC PERFORMANCE.

SHERIFF.—*Sheriff's Sale—Prior Purchaser—Notice of prior Purchase*—33 *Vic., No.* 10.] L. being the licensee under "*The Pastoral Leases Act*, 1869," of certain stations or runs, agreed with F. for the sale of them to him at a price to be paid partly in cash and partly by promissory notes. Payment of the promissory notes was to be secured by a mortgage over the runs and over lands of the purchaser. In pursuance of the agreement the cash was paid and the promissory notes delivered by F. to L., and F. executed the mortgage and entered into possession and continued in possession of the runs. L. executed letters of transfer of them to F., and deposited the letters with his banker, to be handed to F. upon payment of the promissory notes L.'s name remained upon the books of the Lands' Office as that of the licensee of the runs. A writ of *fi fa.* was afterwards issued against the goods and lands of L., and all his right, &c, to the runs was

SHERIFF—*continued.*
sold at a Sheriff's sale, to satisfy the writ, and bought by H., and a deed in the usual form, conveying all L.'s right, title, and interest (if any) in the runs to H., was executed by the Sheriff.
Held, that knowledge of the possession and interest of F. must be imputed to H.
Held, also, that H. acquired no right to have his name substituted for that of L., in the books of the Lands' Office, by virtue of his purchase at the Sheriff's sale.
Query, whether the words in the Sheriff's deed, limiting the sale to all the right, title, and interest (if any) of L. were not alone sufficient to render notice to H. of F.'s previous purchase unnecessary.—FRASER *v.* HARDEN AND LOMAX 10

SMALL DEBTS COURT — *Prohibition — Justices — Petty Sessions — Small Debts—Costs*—17 *Vic., No.* 39, *sec.* 5; 31 *Vic., No.* 29, *sec.* 9.] A writ of prohibition will issue to the Justices of a Court of Petty Sessions whenever they have decided without jurisdiction, or have exceeded their jurisdiction.
A Court of Petty Sessions cannot allow more than £2 2s. for professional costs to either party in any Small Debts cause decided by it. —PETTIGREW *v.* TOWNLEY AND OTHERS 31

SPECIFIC PERFORMANCE—*Sale of Land.*] Upon a sale of a portion of land by auction, it was a condition of sale that the balance of the purchase money beyond £100 should be paid by the purchaser's promissory note at four months, and that, upon payment in full of the purchase money, the vendor should execute a conveyance of the land to the purchaser. The purchaser gave his promissory note for the balance of the purchase money, and before it became due paid the amount into the bank at which it was due, to the credit of the auctioneer, by whom the land was sold. The promissory note was not met, and the vendor did not execute any conveyance. The vendor died, leaving a will, by which he appointed executors, and which was duly proved. On a suit being brought against the executors by the purchaser for the specific performance of the agreement for sale.
Ordered, that the Defendants execute a transfer of the land to the Plaintiff, on

SPECIFIC PERFORMANCE—*continued.*
payment of the balance of the purchase money, and that the Plaintiff pay the costs of the suit; or, if the Defendants decline to execute a transfer, damages be assessed, and each party pay his own costs.—BEARKLEY *v.* PURTILL AND ANOTHER 28

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WILL—*Mortgage of Devised Estates—Direction under* 31 *Vic., No.* 19, *sec.* 6.] A testator being at the time of his death possessed of a station consisting partly of freehold land and partly of leasehold, and of the stock, by his will directed that it should be carried on and managed under the direction of his Executrix until his youngest child should come of age; but at the time of the testator's death the station was mortgaged for a large sum at a high rate of interest, but the will contained no power for the Executrix to mortgage.
The Court directed that the Executrix should be at liberty to substitute for the existing mortgage a mortgage for a sum not exceeding the liability of the station under the previous mortgage at a lower rate of interest.
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THE

QUEENSLAND LAW REPORTS.

CASES

DECIDED IN

THE SUPREME COURT.

EDITED BY

H. R. BEOR, Barrister-at-Law,

FOR THE

QUEENSLAND LAW SOCIETY.

THE JUDGMENTS REPORTED BY MR. W. H. OSBORNE.

VOL. I. PART III.

1878.—41 AND 42 VICTORIA.

BRISBANE:

WATSON, FERGUSON & CO.,

1880.

His Honor Sir JAMES COCKLE, Knt. ...		*Chief Justice.*
,, A. J. P. LUTWYCHE ...	}	*Judges of the Supreme Court.*
,, CHARLES LILLEY		
,, EDMUND SHEPPARD ...		
The Hon. S. W. GRIFFITH		*Attorney-General.*
ROBERT LITTLE		*Crown Solicitor.*

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CASES

DETERMINED BY THE

SUPREME COURT OF QUEENSLAND,

A.D. 1878.—41 AND 42 VICTORIA.

HUNTER *v.* SHIELDS.

1878.

Feb. 6.

Ca. Re. : Affidavit in support of Application for.—31 Vic., No. 4, sec. 48.

The affidavit in support of an application for a writ of *ca. re.* must either state that the action will be defeated unless the Defendant be forthwith apprehended, or state circumstances from which that result can reasonably and naturally and not by conjecture merely, be deduced. If the Deponent speaks from information and belief, he must give the name and description of his informant.

Statement.

IN CHAMBERS. The Plaintiff sued the Defendant on a bill of lading for the value of merchandise, shipped at London for Rockhampton in a vessel of which the Defendant was master, and obtained a writ of *ca. re.* against him. The Defendant took out a summons calling upon the Plaintiff to show cause why the writ should not be set aside on the ground that the plaintiff's affidavit upon which the writ of *ca. re.* was granted did not sufficiently show that the action was likely to be defeated.

Garrick appeared in support of the summons.

Harding showed cause.

Judgment.

LUTWYCHE, J. :—A summons was heard before me on Monday last, calling upon the plaintiff to show cause why the *ca. re.* issued herein on the 15th day of January last, and all subsequent proceedings, should not be set aside on three separate grounds, of which the first was — that the affidavit of the plaintiff upon which the writ was issued did not sufficiently show that the action was likely to be defeated. It is not necessary to advert to the other two grounds. The defendant was arrested and held to bail on the 15th January last, and an appearance to the action was entered on the 21st January; special bail was put in on the 30th January, on which day also the summons was issued. Mr. Harding, in showing cause, contended among other things that the defect in the affidavit, assuming it to exist, which, however, he denies, amounted to at most an irregularity, which had been waived by the action of the defendant in entering an

1878.

HUNTER v. SHIELDS.

Feb. 6.

Judgment.

appearance to the action and by putting in special bail. He cited several authorities from the English courts, which I have since examined. The majority of them refer to the practice which obtained in England at a period antecedent to the passing of the Statute 1 and 2 Victoria, chap. 110, and the few cases decided since that statute was passed, turn upon facts which showed that an irregularity only had been committed. Even under that statute, however, it has been decided that where the application is founded on a material defect in the affidavit to hold to bail it may be made at any time while the suit is pending (see Newton *v.* Harland, 3 Jur. 679, Walker *v.* Lamb, 9 Dowling, 131,) and I think that the defect in the affidavit of the plaintiff upon which he obtained an order for the defendant's arrest was a material defect. Keep *v.* Benjamin, 4 N. S. Wales, Rep. 321, is in point. It was there held that the affidavit must either state that the action will be defeated, following the words of the 2nd section of the 3rd Vic. No. 15, which are identical with those contained in the 48th section of the Common Law Process Act, 31 Vic., No. 4, or must state circumstances from which that result can reasonably and naturally, and not by conjecture merely, be deduced. The plaintiff is precluded from calling in aid the third paragraph of his affidavit, because, although he swears to his belief of a certain fact, he does not state the name of his informant, and therefore, does not bring himself within the exception affecting hearsay evidence, which was established by Gibbons v. Spalding, 11 M. and W. 173. Apart from that paragraph there is nothing in the whole affidavit from which any reasonable inference can be deduced that the natural and probable result of the defendant's intended departure from Rockhampton would be to defeat the action. The plaintiff does not even say that he believes so, and it is quite consistent with such facts stated in the affidavit as I can notice judicially that the defendant may have manifested an intention to proceed to some place within the limits of the colony, or that he may have sufficient property in the colony to satisfy the judgment in the action if it should go against him. The application is made to set aside the writ, but I can mould the order which I shall make upon the summons so as to assume its proper form. (See Hopkinson *v.* Salembier, 7 Dowling, 493.) The order I make is, that the order to hold the defendant to bail, and all subsequent proceedings incidental thereto, be set aside. The plaintiff to pay the defendant's costs of and occasioned by his arrest, and also the costs of this application.

Solicitor for the Plaintiff: *W. J. Brown.*

Solicitors for the Defendant: *Daly and Abbott.*

CHALLINOR *v.* TOWNLEY, POLICE MAGISTRATE, AND OTHERS.

1878.

CHALLINOR *v.* TOWNLEY AND OTHERS.

Feb. 7.

Municipality—Bye-laws—Ultra vires—28 Vict. No. 21, ss. 70, 75, 98.

The Municipal Institutions Act, 1864, secs. 75 and 98, throws upon Municipalities the duty of guarding persons against dangers created by themselves and they cannot by means of their bye-laws shift the responsibility.

A Municipal Bye-Law directed that any owner of land above or below the level of any adjoining pathway within the Municipality should protect it by a good and sufficient fence, so as to prevent damage or accidents.

Held that assuming the Bye-Law to be *intra vires*, the owner could be required to fence only provided he could put up the fence on his own land so as to prevent damage or accident.

Statement.

RULE calling upon the Defendants to show cause why a writ of Prohibition should not issue to prohibit them from further proceeding upon an order of the Defendant, Police Magistrate, by which the Plaintiff was ordered to pay a fine of ten pounds for not fencing an open space adjoining a footway in Ipswich.

The 40th Bye-Law of the Bye-Laws made in the year 1872, by the Council of Ipswich, under the Municipal Institutions Act, 1864, secs. 70, 74, requires that any owner of an open space adjoining any footway or above or below the level of any footway within the Municipality, shall protect it with a good and substantial fence so as to prevent damage or accident. The Plaintiff was the owner of a piece of land in the Municipality of Ipswich abutting upon a footway. The land was formerly fenced off from the footway, but the Municipal Council for the purposes of improvement raised the footway to a considerable height above its former level by means of an embankment which partly rested upon the Plaintiff's land, and in doing so destroyed the Plaintiff's fence. They then required the Plaintiff to fence the land "so as to prevent damage or accident." It was impossible for the Plaintiff to comply without placing the fence upon the embankment formed by the Municipal Council.

The Plaintiff in person in support of the rule, contended that the bye-law was *ultra vires* and that under the 98th sec. of the Act, the Mayor of Ipswich was bound to fence the pathway.

Real, for the Police Magistrate, argued in support of the order.

The Mayor of Ipswich appeared in person for himself and the Corporation of Ipswich.

Judgment.

LILLEY, J.:—On the question whether by-law 40 is *ultra vires*, it is not necessary to decide generally, but so far as it could be construed to throw on an owner of land an obligation imposed by the statute on the municipal authorities, it would be *ultra vires*. I think the duty of

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Feb. 7.

Judgment.

guarding persons against dangers created by the Corporation is thrown upon the municipality by sections 75 and 98 of the Act. A penal omission must be exclusively the nonfeasance of the defendant, and one which he could *alone* obviate or supply. If he must obtain the assistance of the municipality, over which he has no control, he is dispunishable. It is obvious that by-law 40 makes no provision for such cases. Under this by-law the "guard and protection," that is the fence, must be on the defendant's own land. He could not be required to erect it elsewhere. The offence charged seems to be substantially that the Corporation, having encroached several feet on his land by an embankment which creates a danger to persons using the footway along their work, require the defendant to erect a fence, not on his own land, but on their embankment, half way down the slope, under which his land is buried. If he erected the fence on the line of the land they have left him the danger would remain. If he erected it on the super-posed bank along the horizontal line of his original allotment, the danger would not be removed, unless the Corporation contributed filling in. I think, under the by-law, assuming it to be *intra vires* and applicable here, he can only be required to fence when his doing so would give complete protection; this he could not do in this case without the aid of the Corporation, which he is not obliged by any law to seek, and they are not compelled to give; and for the apportionment of which mutual contribution to the public safety no provision has been made. The rule will therefore be absolute.

MISKIN *v.* HUTCHISON AND ANOTHER. (1)

Appeal—Notice—40 Vict., No. 6, O. 57, R. 2.

Where a defeated party to an action has allowed the time for appealing to expire and afterwards applies to the Court to be allowed to appeal, but without showing any other reason for not having brought his appeal within due time except inadvertence, leave to appeal will only be granted, if at all, on very stringent terms.

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MISKIN v. HUTCHISON AND ANOTHER.

March 21.

Statement.

A DEMURRER to the Plaintiff's statement of claim was argued and decided upon in favour of Defendants on the 14th of December, 1877. The Plaintiff allowed the time for appealing to expire, and in March, 1878, moved for leave to appeal notwithstanding the expiration of the time for appealing.

Harding appeared in support of the motion.

The Attorney-General, Pring, Q.C., and *Garrick*, for the Australian Joint Stock Bank, Defendants.

COCKLE, C. J.:—This is purely an appeal to the grace and consideration of the Court, and it is only under certain circumstances that the Court has been induced to yield to the application, but it must be, as it was expected to be, upon very stringent terms. A judgment of my brother Lilley was delivered on the last day of the last term of last year. It was in substance this, that the demurrer was allowed unless an amendment, by which, of course, was to be understood — a material amendment were made. Now the vacation ended on the 2nd February, 1878, the Appeal Court sat on the 5th February, and within a certain number of days after that, it behoved the Plaintiff to bring his appeal, and his vigilance should have been stimulated by a letter dated 6th February, from the Defendants' attorneys, calling upon him to proceed with the appeal. Now, it has been said there was inadvertence, mistake, and surprise. Of course the Court, for the benefit of suitors, would probably under certain circumstances make allowance for inadvertence, that is to say on terms, but I rather regard this application as being made on the ground of mistake and surprise. Well, the only mistake that I can see is this—the very grave and seemingly obvious mistake of thinking that, I will not say a frivolous, but a colorable or illusory amendment would satisfy the condition; or even a nugatory amendment, because I take this to be a nugatory amendment because it was struck out by my brother Lilley, and there has been no appeal against his Judgment in striking out the supposed amendment. That was the mistake, but it was a grave mistake to think that a colorable amendment would protract the duration of the cause and extend the time for giving notice of appeal. The only ground of surprise that I can see, is surprise at the fact that an illusory or nugatory amendment could be struck out. Mistake or surprise in the proper sense of the word there was none. And it is not merely that this February Court was passed over, although there seems to have been ample time for the Plaintiff to have made up his mind whether he intended to appeal against the judgment or not, but the March Appeal Court was also passed over, and there is nothing whatever in this case to render it anything else than an appeal to the grace and, I may say, to the mercy of the Court. However, there are considerations which weigh with me and my colleagues, but which would hardly apply to any other case, to accede to this appeal for mercy and to induce us to think, that perhaps on stringent terms this appeal should be allowed, but only on these terms which, it must be understood, are conditions precedent to our granting the appeal, and

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March 21.

Judgment.

will be unaffected by any future contingency in the case. Appeal allowed to this Court but only on the following conditions:—Payment of costs already made not to be disturbed; all the Defendants' costs from the 14th December last to this day to be paid by the Plaintiff; appeal to be heard this term and whatever the result, the questions of fact are to be filed before leave to appeal to the Privy Council is asked for; the Defendants to have all necessary leave to answer or otherwise to make defence; judgment of this appeal to be entered as of the day following the judgment on questions of fact; if the Plaintiff does not accept these conditions, this application to be dismissed with costs.

LUTWYCHE, J.:—The learned Chief Justice has stated the conditions upon which this leave to appeal is granted, and I need only say that I entirely concur with every word which has fallen from him as to mistake and surprise. At first I was strongly inclined to refuse this application as far as my voice went, and I am only induced to agree to the decision at which the Court has arrived, by the consideration that the case is one of first impression arising on an important colonial statute and depending upon a point of very great nicety and very great importance. It certainly would have been a hardship upon the Plaintiff himself if this leave had been refused in consequence of his taking the advice given him, but that is a hardship which cannot be avoided. As an almost universal rule, certainly as a general rule, the parties must follow the prescribed practice of the Court, and it would take a very strong case indeed to induce me to diverge from the line of practice laid down. I think this is one of those cases and probably I may not live to see another.

LILLEY, J.:—I agree with the judgment of the Court. Perhaps I may suggest a very slight modification of the order, which would be this, if the statement of claim contains by admissions between the parties the actual state of facts there would be no necessity to proceed to trial.

Solicitors for the Plaintiff: *Hart and Flower.*

Solicitors for the Australian Joint Stock Bank: *Daly and Abbott.*

MISKIN *v.* HUTCHISON AND OTHERS. (2)

Conditional Purchase—Contract to take effect after termination of lease—31 Vict., No. 46. Section 54.

The Prohibition contained in the 54th section of *The Crown Lands Alienation Act*, 1868, is an absolute prohibition, and is not voidable at the option either of the Crown or the selector. The prohibition extends to implied agreements and resulting trusts as well as to expressed agreements and trusts.

Statement.

APPEAL from the decision of Mr. Justice Lilley on a demurrer to the Plaintiff's statement of claim in favour of the Defendants.

Statement of Claim :—

2. By an order of the Court made in its Insolvency Jurisdiction, dated the eighteenth day of September, one thousand eight hundred and seventy-six, Frederick John Cobb Wildash and Kenneth Hutchison, theretofore carrying on business together in partnership under the style or firm of Wildash and Hutchison, were adjudicated insolvent upon the petition of George Lewis Golden, a creditor of the said Insolvents, and by the said order, William Henry Miskin was appointed the Official Trustee of their estate, and now sues in his official name as above mentioned.

3. At the first meeting of the creditors of the said insolvents no Trustee was elected and the Plaintiff continued to be and still is the Official Trustee of the said estate.

4. George Ronald Hutchison was a partner with the said Frederick John Cobb Wildash and Kenneth Hutchison in the said firm of Wildash and Hutchison in and since the month of June one thousand eight hundred and seventy three till the said Insolvency, but has not been adjudicated an Insolvent thereunder.

5. The said firm of Wildash and Hutchison were some time prior to the said eighteenth day of September one thousand eight hundred and seventy-six, carrying on business as graziers at the station or run called Canning Downs near Warwick in the colony aforesaid.

6. On the thirtieth day of July one thousand eight hundred and seventy-three, the land known as selection number 864 in the Warwick reserve, in the colony aforesaid, adjacent to the said station or run, was open to selection under the provisions of *The Crown Lands Alienation Act of* 1868, relating to sales by selection.

7. On the said thirtieth day of July one thousand eight hundred and seventy-three, the said George Ronald Hutchison duly made application for the said land in the proper form and mode and to the

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MISKIN v. HUTCHISON AND OTHERS.

April 1.

Statement.

proper officer in that behalf, under and in accordance with the provisions of the 46th section of the said Act.

8. The said land having been duly surveyed and the selection thereof approved by the Secretary for Public Lands, the Governor of the said colony caused to be issued to the said George Ronald Hutchison a lease of the said land subject to the conditions and provisions in the said Act in that behalf contained.

9. The said application was accompanied by a deposit in cash equal to the first instalment payable on the said section under the provisions of the 46th section of the said Act, and at the time of delivering the same to the Land Agent the said George Ronald Hutchison also deposited the survey fees payable in respect of the said selection according to Schedule "H" of the said Act, which said deposit and survey fee amounted together to the sum of sixty-one pounds.

10. The said sum of sixty-one pounds was paid by the said George Ronald Hutchison out of his own moneys.

11. On the thirtieth day of March one thousand eight hundred and seventy-four the said George Ronald Hutchison duly paid to the Land Agent of the district within which the said selection is situated the sum of thirty pounds, being the second year's rent for the said selection.

12. The said rents were paid by the said George Ronald Hutchison out of the moneys of the said firm of Wildash and Hutchison, first had and obtained by the said George Ronald Hutchison from the said firm for that object only and not as a loan by the said firm to him; such last mentioned payment was made for the purposes of the said firm and the carrying on of its business.

13. On the thirtieth day of March one thousand eight hundred and seventy-five the said firm of Wildash and Hutchison paid out of the moneys of the said firm the sum of forty-five pounds being the third year's rent of the said selection; such payment was not made as a loan to the said George Ronald Hutchison, but was made solely for the purposes of the said firm and the carrying on of its business.

14. Between the said thirtieth day of July one thousand eight hundred and seventy-three and the day next hereinafter mentioned the said firm of Wildash and Hutchison made and caused to be made certain improvements on the said land which in all cases were paid for by the said firm out of the moneys of the said firm, and were made or caused to be made for the purposes of the firm solely and for no other purpose whatsoever.

15. The said Commissioner upon the eighth day of May, one thousand eight hundred and seventy-six, issued to the said George Ronald Hutchison a certificate in respect to the said selection that the conditions aforesaid had been duly performed thereon.

16. The improvements upon the said selections required by the said Act and in respect whereof the said certificate was given were the said improvements and no others.

17. The said selection has ever since the date of the aforesaid application for the same, and during the whole of the time that the said station of Canning Downs remained the property of the said firm of Wildash and Hutchison (that is to say till the month of June, one thousand eight hundred and seventy-five), been devoted by the said George Ronald Hutchison to the use of the said firm of Wildash and Hutchison, and has been used as part of the said station and for the purpose of the said firm and the carrying on of its business, and the sheep of the said firm have constantly during the period aforesaid grazed over the said selection, and the same has been used for no other purpose whatever.

18. The said George Ronald Hutchison was a Trustee of the land for the said firm of Wildash and Hutchison when the said station ceased to be the property of the said firm, in the said month of June, one thousand eight hundred and seventy-five.

19. On the thirtieth day of March, one thousand eight hundred and seventy-five, the said Frederick John Cobb Wildash duly paid to the said Land Agent the sum of one hundred and ten pounds three shillings and eight pence being the fourth year's rent for the said selection and other moneys payable in respect thereof.

20. By a Crown grant, number 31,470, dated the fourteenth day of July, one thousand eight hundred and seventy-six, duly registered under the provisions of *The Real Property Act of* 1861 and issued thereunder on the nineteenth day of July, one thousand eight hundred and seventy-six, the said selection was granted to the said George Ronald Hutchison and his heirs free from encumbrances.

21. On the twenty-fourth day of December, one thousand eight hundred and seventy six, the said George Ronald Hutchison by an instrument of Transfer of that date, duly registered under the provisions of *The Real Property Act of* 1861, on the thirtieth day of December, one thousand eight hundred and seventy-six, transferred the said selection to his brother, the Defendant, Alexander Russell Hutchison, who is now the duly registered proprietor of the same

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under the provisions of the said Act for an estate in fee-simple free from encumbrances, and a Certificate of Title, under the said Act, was issued to the Defendant, Alexander Russell Hutchison.

22. The Defendant, Alexander Russell Hutchison never gave full or any valuable consideration in money or otherwise for the said Transfer to the said George Ronald Hutchison or to the said firm of Wildash and Hutchison, and the said George Ronald Hutchison did not nor did the said firm of Wildash and Hutchison ever receive full or any valuable consideration in money or otherwise for the same, from the Defendant, Alexander Russell Hutchison, or any other person.

23. The said Transfer was executed by the said Frederick John Cobb Wildash as attorney for the said George Ronald Hutchison, and was made in order that the Defendant, Alexander Russell Hutchison, should thereby become and be a Trustee for the said firm. and to prevent the just creditors of the said firm of Wildash and Hutchison from having the benefit of the said Selection.

24. The Defendant, Alexander Russell Hutchison, before and at the date of the said transfer and before he in any way contemplated acquiring the selection therein mentioned, had full and actual notice of all and every the facts and circumstances herein set forth, and that the said selection formed part of the property of the said firm of Wildash and Hutchison, and was not the separate property of the said George Ronald Hutchison.

25. On the twenty-sixth day of June, one thousand eight hundred and seventy-seven, the Plaintiff duly lodged a caveat of that date under the provisions of the said Act, whereby he forbad the registration of any instrument affecting the said Selection.

26. Since the said twenty-sixth day of June, one thousand eight hundred and seventy-seven, the Defendants, the Australian Joint Stock Bank, have made advances in money to the Defendant, Alexander Russell Hutchison, upon the security of a deposit of the said Certificate of Title to the said Selection.

27. The Defendants, the Australian Joint Stock Bank, before and at the time when the said advances were so made as aforesaid, had full and actual notice of all and every the facts and circumstances herein set forth, and that the said Selection formed part of the property of the said firm of Wildash and Hutchison at the date of the said adjudication, and was not the property of the Defendant, Alexander Russell Hutchison, other than as a Trustee for the Plaintiff as to two equal undivided third parts or shares thereof.

28. The Defendants threaten and intend unless they shall be restrained by Injunction, to Transfer or otherwise deal with the said Selection.

29. The Plaintiff is ready and willing and hereby offers to make all such payments and to do all such acts in the premises as to this Honorable Court may seem meet.

The Plaintiff claims:—

1. A declaration that the Defendant, Alexander Russell Hutchison is, as to two equal undivided third parts or shares in Selection number 864, Warwick district, being all the land in Deed of Grant, number 31,470, a Trustee for the Plaintiff.

2. If necessary, an account of what is due to the Defendant, Alexander Russell Hutchison, in respect of his said Trusteeship.

3. An order that the Defendant, Alexander Russell Hutchison, upon payment of what (if anything) shall be found due to him on the taking of such account, and which payment the Plaintiff hereby offers to make, do transfer the said shares to the Plaintiff, or

4. A declaration that the Defendant, Alexander Russell Hutchison, is a trustee thereof for the Plaintiff, within the meaning of *The Trustees and Incapacitated Persons Act of* 1867, and

5. An order that the same be vested in the Plaintiff (or the estate of the said Defendants therein).

6. An injunction restraining the Defendants from transferring or otherwise dealing with the said Selection as to the said two shares therein.

7. Payment by the Defendants of the costs of this action.

8. Such further or other relief as the nature of the case may require.

The Australian Joint Stock Bank, Defendants, demurred to the Plaintiff's Statement of Claim on the grounds:—

1. That the alleged trust by which George Ronald Hutchison became, as is alleged, a trustee of the said land for the firm of Wildash and Hutchison, was in violation of the provisions of *The Crown Lands Alienation Act of* 1868, and was illegal and incapable of being admitted or enforced in a Court of Law.

2. That the rights of the Trustee in Insolvency of insolvent members of a partnership against the solvent members thereof in respect of partnership assets, held by the latter, are to have an account taken of the partnership transactions, and to have such assets brought into account, but that such a Trustee is not entitled with-

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out such account to any part of the partnership assets, or any share or interest therein, nor is he entitled to any such share or interest in any of the partnership assets in specie.

3. That as between the Trustee of insolvent partners and the solvent partner or his assigns, the solvent partner does not become a Trustee of partnership assets held by him until after an account has been taken of the partnership assets, and that no trust is therefore shown which can be enforced against these Defendants.

4. That the rights of the Plaintiff as Trustee in Insolvency of the insolvent member of the alleged firm of Wildash and Hutchison, in respect of partnership assets, cannot be declared or enforced in an action to which the solvent member is not a party.

Harding, for the Appellant, cited—

Judicature Act, order 57, rule 7; *Land Act*, 1868, sec. 59; Lewin on Trusts, cap. 9, p. 120, sec. 11; Davenport *v.* the Queen, *Courier*, 1875; Barton *v.* Muir, L.R., 6, P. C., 134; 1 Wms.' Saunders, 442; 1 Smith, L. C., 35, 39; Malins *v.* Freeman, 4 Bing., N. C., 395; Field *v.* Lonsdale, 13 Beav., 78; Santos *v.* Illidge, 8 C. B., N. S. 861; Maxwell on Statutes, 184, 190; Osborne *v.* Williams, 18 Ves., 379; Reynell *v.* Sprye, 1 De G., M. and G., 660, 679; Sharp *v.* Taylor, 2 Phillips, 801, 812, 817, 818; Sheppard *v.* Oxenford, 1 K. and J., 491; Holman *v.* Johnson, Cowp. 341; M'Cormick *v.* Grogan, 4 L.R., H. L., 82, 97; Haigh *v.* Kay, L.R., 7 Ch., 469; Holderness *v.* Lamport, 29 Beav., 129; *Ex parte* Yallop, 15 Ves., 68; *Ex parte* Hoghton, 17 Ves., 251; *Ex parte* Connell, 3 Ded.; Lewis *v.* Lane, 2 M. and K., 449; Howe *v.* Howe, 1 Vern., 415, 1 Peere Wms., 780; Lindley, 594 to 600; *Insolvency Act*, sect. 68; Fox *v.* Hanbury, Cowp., 445; Barker *v.* Goodair, 11 Ves., 87; Wilson *v.* Greenwood, 1 Swanst, 482; Fraser *v.* Kershaw, 2 K. J., 496; Kerr on Frauds, 313.

The Attorney-General, with him *Pring, Q.C.*, and *Garrick*, for the Australian Joint Stock Bank, Respondents, cited—

Lindley, 668, (3rd edit.) 664; *Ex parte* Yallop, 15 Ves., 68; *Ex parte* Hoghton, 17 Ves., 251; Slater *v.* Willis, 1 Beav. 354; Lewin on Trusts, 85, 119-20; Holderness *v.* Lamport, 29 Beav., 129; Barton *v.* Muir, L.R 6, P.C. 134; Lindley, 209; M'Cormick *v.* Grogan, L.R., 4 H.L., 82, 97; Lindley,

681, 1148, 1150; West *v.* Skip, 1 Ves. Senr., 232; Taylor *v.* Field, 4 Ves., 396; Holderness *v.* Shackells, 8 B. and C., 612; Darby *v.* Darby, 25 L.J., Ch. 371, 376; Barker *v.* Goodair, 11 Ves., 87; Wilson *v.* Greenwood, 1 Swanst, 482; Fraser *v.* Kershaw, 2 K. and J., 496.

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Harding in reply—

Lindley, 1098-99, 1118; Kerr, 313. On construction of 68 sec., *Insolvency Act*; Shelford, 196, 197; *Ex parte* Cooke, 2 Peere Wms., 499; Robson, 574.

The Attorney-General—

Story on Pleading, sec. 155; Ellison *v.* Ellison, 6 Ves., 666; Gallard *v.* Ld. Lauderdale, 3 Sim., 1; on appeal, 2 Russ. and M.; Gibbs *v*, Glamis, 11 Sim., 584.

Harding in reply—

Glegg *v.* Reece, L. R., 7 Ch., 70; Jones v. Lock, L R. 1, Ch., 25.

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COCKLE, C.J.:—Although our views are not precisely identical, yet we think it better to give a prompt judgment than to delay for the purpose of reconciling differences which after all are but trifling in themselves and do not affect the result at which we have arrived. I think that this Appeal should be dismissed with costs, and it is material for me to say that I ground my conclusion on the 54th section of the Act of 1868, the last proviso of which it is important to observe enacts "that all contracts agreements and securities made entered "into or given with the intent or which (if the same were valid) "would have the effect of violating all or any of the provisions of "this part of the Act or of any covenant or condition of a lease "granted under this part of the Act and all contracts and agreements "relating to land selected under the foregoing provisions made and "entered into before at or after the termination of the lease or com-"pletion of conditions shall be and are hereby declared to be illegal "and absolutely void whether at law or in equity." Now I take it that any agreement which would have the effect of creating a trust of the fee would be void under this proviso. This statement of claim is very singularly drawn and I cannot help thinking that, in constructing it, the pleader had his eye upon this very proviso. The words "contract" and "agreement" are neither of them used throughout the statement of claim. Their use is avoided, I am almost inclined to

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say, evaded, and I think that the same evitation of the word "security" is almost obvious, for the provision in paragraph 12 of the statement of claim, that the payment of rent was not to be as a loan, was intended to escape the consequences of a security being deemed to arise. Now it has been suggested that a resulting or constructive trust arose. There is ambiguity, I think, in that word, because here we cannot suppose that this constructive or resulting trust arose as a devolution by death. I can only conceive it to have arisen, if at all, upon acts whereof the motives, intentions, aims, and objects are either withheld from us altogether or left to a mere inference, and so left upon pleadings which are themselves fluctuating in their phraseology, for while in paragraphs 12 and 13 nothing is said as to property—and perhaps that is carefully omitted—in paragraphs 24 and 27 the selection is treated not as something used or occupied by the partnership but as the property of the partnership. It is said this trust is to arise upon the facts set out in this statement of claims. By suppressing the words "contract" or "agreement" I suppose it is intended that the inference should be drawn from isolated facts. Now, treating the facts in isolation, I for my part say, that no such legal inference as the plaintiff wishes us to draw with respect to the trust in favor of the firm arose upon these facts.

To summarise:—From the facts treated as isolated facts the suggested trust or title does not legally arise; they are to be before the Court in combination; they must be treated in combination, not to be combined arbitrarily, and in fact so far as I am concerned I limit as much as possible the freedom of combination. It it were permitted to me to make what I deem the most probable conjecture as to the legal results of these facts my conjecture would be, that it was agreed between George Hutchison and his co-partners that in consideration that the firm should pay the second year's rent then that George should during the partnership allow the use and occupation of the land for partnership purposes. But if it be necessary to find what was the precise agreement I think it was the duty of the plaintiff, who best knew the motives of two of the co-partners, to have laid the necessary grounds before the Court. The least I can suppose from the perusal of paragraph 12 is this, that it was agreed by the co-partners that George should pay the rent out of the partnership money, or that Kenneth Hutchison and Wildash should assist George in paying the rent. It seems to me that such an agreement or some such agreement may be deduced, not as an inference from the facts stated in

paragraph 12, but as a mere paraphrase of the words of paragraph 12, and merely paraphrasing the words. I think I am safe in saying that an agreement must have existed and may legally and properly be inferred to have existed. But if it be an agreement which has the effect of violating all or any of the provisions of this Act or of any covenant or condition, or if it be an agreement relating to land to take effect wholly or in part, after the termination of the lease, then it is to be absolutely illegal and void. Being so, I think that with a minimum amount of conjecture, I may safely come to the conclusion that there was nothing to create a valid trust. Now, being unable to resist the conclusion on the facts stated, that an agreement of some sort must have existed, I say that agreement, if it affected or tended to affect the fee, was illegal; if it did not—if it related merely to the use and occupation, then it is quite irrelevant. Even more narrowly, was it a resulting trust? I say that if this was contemplated—if there was any understanding between the parties with reference to it, it was illegal. If no such resulting trust was contemplated I do not see that any injury is done to the plaintiff by this decision, because it was never contemplated by anybody except the trustee when he came to look into the matter. I do not say that it was so, I think the resulting trust, which arose first in the mind of Mr. Miskin, is insufficient to sustain this claim. That being so, I confess I cannot help seeing that when the Crown grant was given, George was the absolute owner of the fee, the owner in law and the owner in equity, and having the right to do as he willed with his own, I cannot see any moral censure that can be deservedly passed upon him because he chose to benefit his friends and prevent the creditors of the firm from getting the money; a design to start a connection, or a relation, or even a friend, in life, to give such a person a fresh start, is one which cannot be called immoral or illegal. I think therefore, that this appeal must be dismissed and with costs. It is not necessary for the purposes of this decision to say anything about the 68th section, but it may be useful to say that the majority of the Court are of opinion that this section was not well pleaded.

LUTWYCHE, J.:—I agree with the learned Chief Justice in thinking that this appeal ought to be dismissed with costs. I cannot help admitting the very great force of the argument with which the learned Chief Justice has fortified his opinion as to the illegality of the agreement which was made between the firm and Hutchison, if such an agreement was really made. As Mr. Justice Lilley said in the

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judgment he gave when the demurrer was originally allowed—"there is very cogent evidence indeed to induce a conclusion that such an illegal agreement was made, and was therefore void under the 54th section of the *Land Act*." But I prefer resting my own individual judgment in dealing with this case upon the plain, broad, and admitted facts which appear upon the statement of claim. I do not myself decide or give as my opinion, that there was such an illegal agreement made; I think, however, that there was an agreement made between George Hutchison and his partners, Wildash and Kenneth Hutchison, but I think that agreement was a legal one, I think it was capable of being enforced, and I think it was enforced. The contract was executed at the time the occupation of the station of Canning Downs by the firm for pastoral purposes ceased. To my mind the statement of claim clearly shows these facts, that the three members of the firm, Wildash, Kenneth and George Hutchison were partners in the firm of Wildash and Hutchison, and that George Hutchison having a selection, which is the subject of the claim, and having paid the first year's rent out of his own money, obtained with the consent of the partnership, the money for the second year's rent out of moneys belonging to the firm, and, following the paragraphs of the statement of claim, I think that the agreement made between them amounted to this, that in consideration of the payments and in consideration of the improvements made on the selection while the firm remained in possession of Canning Downs, they were content to use the selection for the purposes of the firm, that is to say, for the pastoral purpose of grazing sheep. That appears to me to be a very good and certainly a legal agreement. After the occupation had ceased, there is nothing upon the face of the statement of claim to show what was done with the property except this, that the fourth year's rent was paid by Wildash, out of whose money it does not appear (but no inference is to be drawn from that fact), and that George obtained a grant from the Crown, and must therefore have necessarily paid the balance of the 10 years' rent out of his own funds. That being so, and the agreement having been as I say executed, no trust arises in favour of the trustee of the insolvent estate of Wildash and Hutchison, and therefore the plaintiff has made out no title to the relief sought in this case. I may add that I think that George Hutchison was not a necessary party to this action.

LILLEY, J.:—The facts in this statement of claim are so ambiguously set out, that I am not in a position to say that the conclusions to which the majority of the Court have come are not fully warranted by the pleading. It is a question merely of construction, and it may be that the agreement was one merely for the use and occupation of the selection of George Ronald Hutchison by the firm, but I prefer, with the greatest possible deference, to adhere to my own judgment in the Court below. I think when we look at the nature of the title that George Hutchison was holding from the Crown, that it was a lease entitling him to the fee simple on the performance of certain conditions, the payment of certain rents, which are treated by the statute as purchase money, and the making of certain improvements which are also included in the purchase money; and I think that if the statute had imposed no prohibition, and if these were merely ordinary circumstances—dealings by members of the firm with partnership money, there would have been a resulting trust in the advantages to be obtained from the lease, and that all the members of the firm would have had an interest in it, in the nature of a resulting trust in the fee. Of course if there was an agreement merely of the kind described by my learned colleagues, there would have been no interest in the fee and no title, and I entirely agree with the conclusions to which they have come upon that construction of the pleading. It may be, however, that on looking more closely into this pleading, that I have put a too favourable construction upon it for the plaintiff. It may be that instead of a trust resulting merely from the action of one of the parties that there was in fact an agreement, express or implied, between them, that the conditions should be performed and the rents paid, and that the firm should afterwards acquire by some act of the selector, an interest in the fee. Looking merely, as I have said, at the facts set out in the paragraphs preceding the 18th, there would be nothing more at the most, than a resulting trust in the fee, but if paragraph 18 is to be treated as something more than a statement of the legal or equitable result of the facts previously stated, it may be and it has been contended by Mr. Harding in his argument, that it is more than a mere conclusion of law, that it is a statement of the fact that George Ronald Hutchison was a trustee of the land for the said firm. If I am wrong in my conclusions, that the facts set out show a resulting trust, and if this be a statement of a fact, then he could only be a trustee of the land for the firm by means of some agreement. If that were so it was before the issue of the Crown grant, and was a title

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which could only take effect after the completion of conditions and by means of a grant from the Crown, so that at the time the land would be subject to a contract or agreement relating to land selected under the Act, and made and entered into before, at or after the execution of the lease, and to take effect wholly or in part at or after the termination of the lease or on completion of conditions, and as such it would be illegal and absolutely void. It has been argued by Mr. Harding that this is a proviso for the benefit of the selector and is only voidable by him; it has also been contended by him, that it is for the benefit of the Crown and voidable at the option of the Crown; his contention is that the selector and the Crown not having avoided it the selection remained untouched and passed on from George to Alexander for the benefit of the creditors. Now, to those who are acquainted with the history and policy of this piece of land legislation, there can be no doubt as to the meaning of this prohibition, that it is an absolute prohibition. Looking at this 54th section alone, it may be seen that every line and word is aimed against secret titles in the land. The object is to secure that the selector shall be the real owner of the land until he has fulfilled the conditions. Then it is his own and he is in a position to do as he likes with his own. The object of the section is to prevent what is known as the practice of dummying, it is in fact to prevent one man selecting 2, 3, 4, or 50 selections by means of his servants or agents, and of performing the conditions imposed by the statute through them and then of taking to himself the whole of the selection. The intention is to effect settlement upon the land, to create permanent settlement, and to distribute the land among the settlers in certain proportions fixed by the statute; it is not to deprive the colony of the benefit of 3, 5, 50, or 100 settlers and give it over to only one. That is the policy of the statute undoubtedly, and where the words "absolutely void," and particularly where the words "illegal and absolutely void" are used, and the statute is made to carry out some act of public policy, the narrow construction that the language of the Act means only "voidable and not void," cannot be put upon it. It is an absolute prohibition Then, if a resulting trust or an implied or expressed agreement existed at the time George Ronald Hutchison received the grant from the Crown, such a transaction would be illegal. It was a grant from the Crown to him and discharged him from any such trust as the pleader has endeavored to impose upon him. That being so, the transfer from George to Alexander Russell Hutchison that he should thereby become and be a

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trustee for the said firm, and to prevent the just creditors of the said firm of Wildash and Hutchison from having the benefit of the said selection, such a transaction would certainly not pass on for the benefit of the creditors any interest in the land. He was the owner of the land, he gave it to Alexander and the other members of the firm, but expressly that the creditors of the firm should have no interest whatever in the land. As he was solvent at the time and no claim is shown by the creditors to this land, he had a right to do with it as he thought best and thus to deprive the creditors of the firm of any benefit in the land. I think it unnecessary to enter any further into that. There was no trust that the firm or the Official Trustee could enforce against those who took under George or Alexander. As to the non-joinder of George, I expressed my opinion in the Court below, and it remains unaltered. I think he was not a necessary party to the suit; this is a minor point, the question is title or no title, and the Court are of opinion that there was no title, and the appeal will be dismissed with costs.

Solicitors for the Appellant, *Hart and Flower.*

Solicitors for the Bank, *Daly and Abbott.*

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Answer tending to criminate.—31 Vict. No. 46, secs. 54, 57, 127, 128, 129.—Costs.

An information was filed by the Attorney-General against S. and others, the object of which was to obtain a declaration that certain lands originally Crown lands, were acquired by S. in violation of the 54th section and other provisions of *The Crown Lands Alienation Act of* 1868, and interrogatories were administered to the Defendants. S. by his answer set up his right to protect himself from pains, penalties, and forfeiture, by refusing to make specific answer to the information and interrogatories.

Held that in order to entitle the Attorney-General to the relief claimed, it would be necessary to prove facts which would show that S. had incurred a forfeiture of the land under section 128 of the Act, and render him liable to a prosecution for a misdemeanor under sections 127 and 129 of the Act, and that therefore S. could not be compelled to make a further and better answer.

Section 57 of *The Crown Lands Alienation Act of* 1868 does not imply a contract by the lessee to disclose to the Government the extent to which he has complied with the covenant and conditions of his lease.

Such a contract would not be binding to waive the right of the contracting party to protect himself from pains, penalties, or forfeiture by refusing to disclose.

Costs of a motion for further and better answer to information and interrogatories discharged on the ground that answer would tend to criminate, made costs in the cause.

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MOTION on behalf of the Attorney-General that the Defendant, Simpson, might be ordered to put in a further and better answer to an information filed in the suit by the Attorney-General.

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The suit was commenced before the passing of *The Judicature Act of* 1876.

The information stated that in December, 1870, the Defendants, Geo. Simpson, Hay, and J. C. Thomson, entered into a partnership for the purpose of acquiring land in this colony; and with the object of more effectually carrying out the purpose they had in view, it was agreed between them that each of them should make application under the provisions of *The Crown Lands Alienation Act of* 1868 for as much land as one person might lawfully apply for, and that other persons should be procured to make application in like manner for other lands in such places as might be pointed out to them by the said Defendants. It was further agreed that the land so applied for should form one estate and that the other persons referred to should be admitted into the partnership till they had severally acquired deeds of grant of their selections, when these should be transferred to the said Defendants, who were to pay the rents and purchase-money of the same. The object of the proposed scheme was alleged to be to enable the said Defendants to acquire more land than they were entitled to hold under the Act. In pursuance of this scheme, the three Defendants mentioned applied for and obtained three adjoining selections, (selections 126, 127, and 129), consisting of 2560 acres each; and shortly afterwards, at their request, the defendant, H. G. Simpson (a brother of G. M. Simpson), took up a selection (No. 149) in the same district, containing 3875 acres. On the 15th of February, 1871, four applications were lodged by the Defendant, John Hay, for adjoining selections in the Dalby district, and subsequently approved. One of these (selection 159) was in his own name, and was for 1272 acres of agricultural and second-class pastoral land; another (No. 158) was that of the Defendant, W. C. Mayne, for 3778 acres of agricultural and first and second-class pastoral land; the third (No. 145) was on behalf of the Defendant, J. P. M'Gregor, and was for 3776 acres agricultural and first and second-class pastoral; and the fourth (No. 146) was in the name of the Defendant, J. Martin, and represented 3789 acres agricultural and first and second-class pastoral country. This latter selection consisted of twenty one separate pieces of land, some of which were not conterminous to the others, and were only contiguous to them at their corners. By this means a large quantity of land not taken up was rendered inaccessible to any persons other than the applicant or those with whom he arranged for the purpose of allowing them access to the same. The leases for these lands were

delivered to the Defendant, George Simpson, who was manager for the said partnership, and have since remained in his custody. On February 17, 1871, three other selections adjoining those just mentioned were applied for as follows, and subsequently granted:— (No.162), G. M. Simpson, 1569 acres agricultural and second-class pastoral; (No. 161), J. C. Thomson, 1253 acres agricultural and second-class pastoral; and (No. 160), C. Thompson, 1246 acres agricultural and second-class pastoral. Early in the month of April of the same year, the Defendant, A. S. Garland, arrived in the colony, and applied for two selections under the agreement mentioned. These consisted of selection 188, containing 2414 acres, and embracing all the land lying between the various portions of selection 146 and that selection and selection 160; and selection 189, containing 1425 acres, and adjoining part of selection 146. The moneys paid in respect of all these selections, as well as for the improvements made thereon, were paid out of the funds of the three Defendants, G. M. Simpson, Hay, and J. C. Thomson. The Defendants, M'Gregor, Martin, C. Thompson, and Garland, were, prior to making the applications, in the employ of G. M. Simpson, and had since remained in such employment; and the lands selected as described have since been used by and as the property of, the firm of G. M. Simpson and Co. The Defendants refuse to discover the exact terms of the partnership agreement existing between them. All of them, with the exception of G. M. Simpson, Hay, and J. C. Thomson, were, at the time they made their respective applications, agents and servants of the three Defendants just mentioned, or some one of them, in respect to the land which they respectively applied to select, and none of them had used the lands selected except as stated, it being understood that the whole of it, as soon as deeds of grant were obtained, was to be conveyed to the three Defendants named or to one of them. On the 20th March, deeds of grant were issued to G. M. Simpson in respect of selections 126 and 162, and another to H. G. Simpson for selection 149. In June, 1873, the commissioner for the district, on application of G. M. Simpson, issued certificates of fulfilment of conditions to the Defendants Martin and Garland in respect of selections 146, 188, 189 respectively. In the month of September of the same year the balance of the 10 years' rent payable in respect of these three selections was paid by G. M. Simpson out of the moneys of the firm, and application made for deeds of grant for the same. Before this payment was made, Martin aud Garland each executed a power-of-attorney authorising G. M. Simpson

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to deal with the lands when deeds of grants should have been issued, these powers being made, it is alleged, in order to enable the last-named Defendant to convey the lands to himself. Before November 1873, the Defendants, Hay, and J. C. Thomson, procured the commissioner to issue to them certificates in respect of selections 127, 129, 159, and 161, respectively; and on November 21 following the balance of the 10 years' rent upon these four selections was paid out of the funds of the firm as in the case of the selections before mentioned. In June, 1873, on the application of G. M. Simpson, certificates were also granted to the Defendants, Mayne, M'Gregor, and Charles Thompson, in respect of selections 158, 146, and 160 respectively. All the certificates issued were applied for on behalf of the firm of G. M. Simpson and Co., and the applications were supported by evidence procured by G. M. Simpson, which induced the commissioner to believe that the conditions of the Act had been complied with, particularly that the several lessees of the lands in question had by themselves or their agents or bailiffs resided on the said lands for a period of two years; whereas, in fact, the persons who had so resided were the servants of the said firm of Simpson and Co. The said evidence was procured, it is alleged, for the purpose of evading the provisions of the Act; and it was not until the certificates had been granted that the facts detailed came to the knowledge of the Government. By a proclamation, dated November 11, 1874, the leases of selections 127, 129, 159, 158, 145, 146, 161, 160, 188, and 189, were declared forfeited, on the ground that the lands mentioned therein had been acquired in violation of the provisions of the 54th section of the Act; but the Defendants refuse to give up possession of the said lands, and say the proclamation is of no effect.

The information prayed:—1. That it might be declared that the leases of the several selections mentioned therein—viz., Nos. 127, 129, 159, 145, 146, 161, 162, 188, and 189, in the Dalby district—were acquired in violation of the provisions of the 54th section and other provisions of *The Crown Lands Alienation Act of* 1868. 2. That it might be declared that the certificates of the commissioner of fulfilment of conditions in respect of the same were obtained by fraud, and are void and inoperative. 3. That it might be declared that the terms created by the said several leases have ceased and determined, and that the lands comprised therein have reverted to Her Majesty. 4. That the said several leases and certificates might be delivered up to be cancelled.

The interrogatories required particulars of these selections more in detail than they were given in the information. The answer of G. M. Simpson to the information is to the effect that it appears on the face of the same that it was filed for the purpose of having it declared that he was subject to certain pains, penalties, and forfeitures, enacted by the Act of 1868 in respect of the lands mentioned, by reason of the allegations set forth in such information; that all such allegations, as to which discovery is sought by the interrogatories, would be, if true, links in the chain of proof requisite to entitle the informant to the relief prayed in his said information; and that, by the settled and known rules of the Court, he (Simpson) was not bound to answer such allegations or interrogatories; and that he did not admit any of the matters charged against him.

The Attorney-General, (Pring, Q.C., and *Real*, with him) submitted that the answer was no answer; that the Defendant, Simpson, by it averred nothing concerning himself; and, in respect of the pains, penalties, and forfeitures mentioned, that the information had been filed for the purpose of recovering certain lands which were averred to be, and always to have been, Crown lands, and not for the purpose mentioned in the answer. He contended that the inability of a fraudulent applicant to acquire land was not in the nature of a penalty or forfeiture; that if any question of forfeiture arose as regards the Defendant, George M. Simpson, it was only a collateral question, and was not a sufficient ground for refusing to answer; that the said Defendant, to be relieved from answering on the ground that by so doing he would be subjecting himself to "pains, penalties, and forfeitures," must state on oath that such would be the case; that a selector, under the Act of 1868, was bound by the nature of the transaction into which he entered, to answer any question that might be put to him under section 57; and that, even if the defendant was not bound to make a discovery as to the criminating portions of the information, it need not be taken as a whole, but answers should be given to those parts which were not of such a nature.

He cited Kerr on Discovery, p. 156; A. G. *v.* Duplessis (1 Bro. P.C., 415); Green *v.* Weaver (1 Sim., 404); Chadwick *v.* Chadwick (22 L.J., Ch. 330); Daniel Ch. Pr., pp. 518, 521; Dunmer *v.* Corporation of Chippenham (14 Ves., 245); Scott *v.* Miller (Johnson, 328); Fisher *v.* Ronalds (12 C.B., 725); *Crown Lands Alienation Act*, 1868, sec. 57; Fisher *v.* Price (11 Beav., 194).

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Harding (Pope Cooper with him*)* cited *Crown Lands Alienation Act*, 1868, sec. 127, and submitted that as it directly appeared on the face of the information that if the relief thereby prayed were granted, one of the defendants would be liable under the statute for a misdemeanor, the discovery asked for could not be enforced. It could only be by a violation of the 54th section of the Act that this land could have been forfeited; and if the defendants had not been guilty of such violation there could be no forfeiture, and consequently no misdemeanor committed. But if there had been a violation of this section, the Attorney General must succeed, and if a misdemeanor had been committed, the defendants could not be compelled to discover anything that was criminatory. The informant could not ask them to answer questions as to whether the acts charged against them had been committed or not, because by so doing they would be subjecting themselves to "pains, penalties, and forfeitures." Taking away the criminatory matter, there was nothing entitling the informant to relief, and a discovery could not be sought as to the remainder.

He also cited *Crown Lands Alienation Act*, 1868, secs. 54, 128, 129; Hare on Discovery, p.p. 102, 105; Paxton *v.* Douglas (19 Ves,, 225); Claridge *v.* Howe (14 Ves., 59); Thorpe *v.* Macaulay (5 Madd., 218); U. S. of America *v.* Macrae (L.R. 3 Ch., 379); Sharpe *v.* Carter (3 Peere Wms., 375); Honeywood *v.* Selwyn (3 Atk., 275); A. G. *v.* Lucas (2 Ha., 566); Lichfield (Earl of) *v.* Bond (6 Beav. 88); Fisher *v.* Price (11 Beav., 194); Short *v.* Mercer (3 McN. & G., 205); Lee *v.* Read (5 Beav., 381).

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LILLEY, J. :—In this cause the Attorney-General moved for an order that the defendant, George Morris Simpson, put in a further and better answer to the information and interrogatories. The suit is substantially, and in fact, entirely, for a declaration that certain lands originally Crown lands were acquired in violation of the provisions of the 54th section and other provisions of *The Crown Lands Alienation Act of* 1868. The defendant Simpson has put in an answer by which he claims the benefit of the protection which is given to a defendant in Courts of Equity where by answering he would expose himself, or might expose himself, to pains, penalties, or forfeitures. He submits that the information is filed for the purpose of having it declared that he is subject to certain pains, penalties, and forfeitures by *The Crown Lands Alienation Act.* The Attorney-General pressed upon me that the suit was in effect for the recovery of the lands, and not for the purpose of subjecting the defendant to these pains, penalties, and forfeitures

I have made a very close examination of the pleadings, as I was urged to do by the Attorney-General, with the greatest propriety, of course, and I cannot fail to see that, in order to entitle him to the relief claimed, he must prove in substance that the defendant Simpson has been guilty of some violation of the provisions of the Alienation Act. Now, I cannot also fail to see that in proving that, in order to entitle the Attorney-General to the relief he claims, he must shew a transaction that would expose the defendant to a forfeiture of the land to begin with, and possibly to a criminal prosecution for a misdemeanor under other portions of the statute. The Attorney-General, of course, says that the answer must be made either to the whole or to part of the information. So far I agree with him if any part of the information can be clearly separated from the whole without laying the defendant under the peril of a prosecution or criminal penalty, or forfeiture, it would of course be answerable, and he would be required to answer. On looking through the information, I cannot see myself that there is any part of it so clearly separable from the rest as to entitle the Attorney-General (assuming that the defendant has protection on the whole of the information) to an answer to that part alone. If we take the very first paragraph of the information, which the Attorney-General pressed upon my attention, I find that, although it would seem not inseparable, on a close examination in connection with the whole of the information, it is not to my mind so clearly separable as to deprive the defendant of the protection which the law gives him. That paragraph 1 states "The several lands hereinafter mentioned were, at the times of the several applications hereinafter stated, open for selection under the provisions of *The Crown Lands Alienation Act of* 1868, relating to conditional purchase."

Now, it would be one of the very first steps in a prosecution to prove that these lands were open for selection, and when we note the peculiar language of this paragraph, and connect it with the description of the lands therein mentioned, and the circumstances surrounding the acquisitions, why it is hardly possible, I think, for any man, however ingenious, to run a line of distinction between this paragraph and the other portions of the information. Looking at this paragraph, in connection with paragraphs 2, 3, and 4, in which the scheme of fraud is set out by the pleader, it is impossible to say that it could be in any way separable from the rest of the information; in fact, looking at the paragraphs beginning at 1, and taking 2, 3, and 4, and especially adding

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to it paragraphs 36, 39, 41, and 42, and the first prayer of the information, I think it is impossible to say that any portion of the information, even that portion which contains a description of the said lands, can be so clearly separable from the rest as to deprive the defendant of his protection, and cast upon him the burden of giving an answer to any part of the information.

I have stated that paragraphs 2, 3, and 4, contain the scheme of fraud; then paragraph 36, which I have already mentioned, distinctly points to the scheme. "The said evidence was procured by the defendant, George Morris Simpson, for the purpose of evading the provisions of the said Act, and in pursuance of the said scheme."

Then again, 39 details the forfeiture of the lands as "having been acquired in violation of the provisions of the 54th section of the said Act."

Then the Attorney-General, in paragraph 41, charges that the "certificates are void and inoperative, inasmuch as they were obtained in fraud of the said Act," and in paragraph 42, he further charges that "all the said lands were acquired by the several lessees in violation of the provisions of the 54th section of the said Act," and then there is the prayer number one, to which I have already referred, seeking a declaration "that the leases were acquired in violation of the provisions of the 54th section, and other provisions of the said Act." It seems to me that every portion of the information is so interwoven with the other that it is impossible to separate them for the purpose of a further or better answer if the present answer is insufficient. Now, the 54th section, upon which this information is mainly framed, I suppose, declares that "No person shall become the lessee or assignee of any such land who is an infant or a married woman, or who is in respect of the land which he applies to select, or any part thereof, an agent or a servant of or a trustee for any other person." In fact, it imposes in the first part certain disabilities, and renders the existence of these disabilities, or a violation of the Act, causes of forfeiture; and it appears in this case from the information, that the Governor has by proclamation declared the lands forfeited, and this suit would merely complete what the Governor has begun. But if we go to the concluding portion of the section, under which these transactions may possibly come, there is an absolute declaration of forfeiture against the defendant, George Morris Simpson. But there is a further aspect of the case; not only is he exposed to forfeiture, pains, and penalties, but he

is exposed in fact to a prosecution for a misdemeanor under sections 127 and 129 of the statute. Section 127 provides that "any person who shall fraudulently evade or attempt to evade any of the provisions of this Act or otherwise commit any fraud thereon for the acquisition of land or shall aid any such evasion attempt or fraud shall be guilty of a misdemeanor and on conviction thereof shall be imprisoned and kept to hard labor for a period of not more than two years." Section 128 forfeits certain lands, and section 129 imposes the penalties of misdemeanor on "any person who shall convey transfer lease or assign any lands acquired or held by any fraud upon the provisions of this Act." Well, looking again at the information upon this branch of the case, it appears to me that the matters in the information, if proved in an ordinary prosecution for misdemeanor, would subject the defendant to punishment under these provisions of the statute. It appears to me on the face of the information that the general rule that a man can protect himself from answering any matter that may subject him to pains, penalties, or forfeiture must apply, unless it can be brought within any one of the exceptions argued before me by the Attorney-General. The Attorney-General referred to the old charge of conspiracy on the pleadings, and quoted the case of "Dunmer *v.* the Corporation of Chippenham, 14 Vesey, 245," but in that case you will find that, although the demurrer was overruled, it was overruled without prejudice to the defendants insisting by their answer against making discovery. The old rule as to conspiracy is laid down by Lord Chancellor Hardwicke in "Chetwynd *v.* Lindon, 2 Vesey, sen. 450." An argument similar to that addressed to me by the Attorney-General in this case was addressed to him that the defendant was bound to answer. The Lord Chancellor said, "The question is, whether it is so charged, as, if confessed in the answer, would be a ground for a criminal prosecution in a court of law; for it is not every conspiracy will be a ground for a criminal prosecution. If that was the case, almost all the causes in this court would come within that description. The boundaries are often very nice where a matter is near indictable and a fraud on this court." The rule then would be if the conspiracy charged in the bill or information would expose the defendant to a criminal prosecution, he may claim the protection which the law gives him in his answer. Unless the Attorney-General has satisfied me that this case falls within one of the exceptions stated by him, I must hold that the answer is so far sufficient. The Attorney-General insisted that, under the 54th section, the information was not so much for a forfeiture as for a decla-

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ration of the original inability to acquire, that there were certain classes of persons mentioned in the 54th section who could not take up Crown lands, and that therefore it was merely a declaration of the title of the Crown against a person who had got the lands, but who was unable to acquire or hold them. The case upon which he rests his argument is "Duplessis *v.* the Attorney-General, 1, Brown's Parliamentary Cases, 415," in which it has been said by the text writers that it was held that an alien could not protect herself from answering whether or not she was an alien. I am doubtful myself whether that was really the decision, for on looking at the judgment of the Lord Chancellor, in "Finch *v.* Finch, 2 Vesey, sen., 494," I find that Lord Hardwicke on referring to that case said:—"It was the same in the case of Mrs. Duplessis. There it was prayed she should discover whether she was an alien, and where born? I held she was not bound to discover whether she was an alien, but that she was whether her child was an alien, and where born, and obliged her to set it forth." That is within a few months of the decision reported in Brown's Parliamentary Cases, and on looking to the head-note to the case in Brown's Parliamentary Cases, I find this is stated:—"By the known law of the land, no alien born can take, by grant, devise, or other purchase, any freehold or chattels real for his own benefit; but can and does in such cases take for the benefit of the Crown; yet this disability, being neither a penalty or forfeiture, the alien cannot demur to an information filed for discovering the place of his birth, in order to establish the fact of alienage." The judgment probably referred to the alienage of the child and not of the mother. However, the case is sufficiently distinguishable from the present, for in that case it was held there was no penalty or forfeiture, while in the present case there are pains, penalties, and forfeitures for certain illegal or irregular transactions under the statute. So that even if the case has been reported with perfect accuracy in Brown, it is broadly distinguishable from the present case.

Then with regard to the second exception, or alleged exception, that the defendant had contracted to answer, or that he had entered into some transaction, or had so conducted himself in relation to the Crown that he was compelled to answer, although it might expose him to a penalty. In support of that the Attorney-General quoted "Green *v.* Weaver, 1 Simon, 404." It is observable in that case that it was a pecuniary penalty, and there was an express contract between the plaintiff and the defendant for the performance of a certain duty. Now the section of our statute upon which the Attorney-General

relied was the 57th, "So soon as a lessee shall have made the last payment of instalments as hereinbefore provided, he shall be entitled to a grant in fee simple of the land leased to him, subject, however, to the payment of the fees chargeable on the issue of deeds of grant, and provided that he shall prove to the Governor-in-Council that he has faithfully complied with all the covenants and conditions contained in or implied by his lease under the provisions of this Act." It seems to me that the whole effect of that section is this: We give you a certain right, you have a title to certain land, but upon these conditions, that you show you have faithfully complied with the conditions upon which you took the lease, and any other terms requisite to be fulfilled before you were entitled to a grant in fee. But I see no contract compelling the defendant to apply for a grant; he might say that 10 years' lease is sufficient for my purpose. There is nothing casting upon him any duty to make any disclosures to the Governor. He is not to be entitled unless he performs certain conditions. It seems to me, then, that there was no agreement here, and no contract in any way casting upon him any obligation to make any disclosure or discovery. In "Green *v.* Weaver" it was simply for a pecuniary penalty, and in all this class of cases I find the word "penalty" used with reference to a pecuniary penalty, and they are all founded upon express contracts; and in the earliest case of the kind, reported in Mosely, I find the word "penalty" was used, but not in the shape of a criminal prosecution. I think there is nothing to show that he has contracted, and, indeed, I have strong faith in the dictum of Lord Langdale, in "Lee *v.* Read, 5 Beavan, 381," that where the matter would subject him to a criminal prosecution, a man cannot contract to waive the right he has to protect himself from a criminal prosecution. Otherwise, where is the limit? Suppose the matter would tend to show him guilty of murder, would he be bound to answer? An extreme case tests the validity of the supposed rule. I think, therefore, that he has not contracted or so conducted himself as to render it obligatory upon him to make discovery. Then, the last material exception, that this was only an incidental matter; that the suit was not for penalties, but only for the land. It seems to me the gist of the suit is to prove an evasion or violation of the Act as the foundation of the recovery. George Morris Simpson is in every paragraph of the information, except paragraph 1, either by name or as one of "the defendants." "George Morris Simpson" and "the said land" and "the said scheme" are all implicated together, and it is impossible to separate them. I think none of the exceptions established, and that

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the general rule must prevail, and that the Attorney-General is not entitled to any further or better answer, and the motion will be dismissed. On the subject of costs, Courts of Equity do not favor answers of this kind. Whilst therefore, I dismiss the motion, I leave the costs to be costs in the cause.

Solicitor for the Crown: *R. Little.*

Solicitors for the Defendants: *Hart & Flower.*

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HEMPSTED v. GARDNER.

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Statement.

HEMPSTED *v.* GARDNER.

New Trial—Mistrial through default of party applying for New Trial.

A party is not entitled to a new trial upon any ground founded upon his own default.

Where it appeared that the real question between the parties to an action had through the default of the Plaintiff not been tried, the Court, upon the application of the Plaintiff for a new trial, directed a nonsuit to be entered, with a direction that it should not operate as a judgment on the merits.

MOTION on behalf of the Plaintiff for rule absolute for a new trial.

The action was for the breach of a patent for stopping bottles containing aerated waters. The first question submitted to the jury was whether the bottle and plug produced by the Plaintiff consisted of the thing patented, the learned Judge directing them that if this was not the patented invention there would be no protection. This question was answered in the negative, and judgment was entered for the Defendant on that issue. All the other facts in the case were found for the Plaintiff. It appeared from the evidence in the Court below, that the stopper used by the Plaintiff was not of exactly the same construction as that described in the specification of his patent. The Plaintiff had been in the habit of putting the plug and washer forming the stopper into the bottle separately, and by means of a contrivance made for the purpose, forcing the latter on to the plug afterwards; whereas, according to the description in the specification, the plug should be so constructed that the washer can be put on it first and both forced into the bottle together.

A rule *nisi* was granted on the motion of the Plaintiff for a new trial on the ground that the finding of the jury was against the weight of evidence, and on the ground of surprise.

Harding (Real with him*)* moved the rule absolute.

The Attorney-General (Pring, Q.C., with him*)* opposed the rule and cited:—Leed *v.* Higgins (8 H.L.C., 550); Lewis *v.* Marling (4 C. & P., 52); Penn *v.* Bibly (L.R., 2 Ch., 127); Neilson *v.* Betts (L.R., 5 H.L., 24); Hinton's Patent *v.* Safety Lighting Co. (British Trade Journal, 1 June, 1877, p. 20).

Harding cited:—Crossby *v.* Bevan (3 C. & P., 513).

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COCKLE, C.J. :—In this case we disposed of the misdirection point upon the rule *nisi*, and at the same time we intimated our opinion that the verdict could not be said to be against the evidence, but that the court wished the case to be discussed again upon the point of miscarriage or mistrial, and accordingly that was introduced into the rule by the plaintiff and by way of amendment this morning the ground of quasi-surprise, inasmuch as the question at the trial which the plaintiff desired to have tried being "was there an infringement of the letters of registration," the minds of the jury were directed rather to the question, "was the article used by the plaintiff the article described in the letters of registration." Now it might be raising a very dangerous precedent to say that any such ground as this should be sufficient for the granting of a new trial, otherwise there would hardly be a case in which some misconception on the part of the counsel on one side or the other might not be urged as a ground for disturbing a decision and verdict carefully and accurately arrived at. I think it is well to look at what would be the analogy in a case pleaded under the old practice, and there I think the rule was not to award a repleader on the motion of the party who made the first slip in pleading. That a slip of some kind was made here can scarcely be doubted, and that slip consisted in the introduction of the bottle and the cylindrical stopper as secondary evidence not described in the specification. The jury, on being appealed to, declared that the so called secondary evidence did not represent the thing described in the specification, and how can one wonder when that non-representing secondary evidence was accompanied by the evidence of the plaintiff himself about the use of that seemingly complicated engine, the line and three-pronged rod, that the jury came to the conclusion they did. I think therefore it would be very dangerous to grant a new trial on this ground. Still, as there may be some question to be litigated between the parties in the present case the court seem to think that it would be right to vacate the judgment and to order that in place thereof a nonsuit be entered with the direction that that nonsuit shall not operate as a judgment upon the merits.

LUTWYCHE, J. :—I come to the same conclusion as the learned Chief Justice, and for the same reasons. As far as my experience goes, and as far as I can venture to infer any inflexible rule from the books of practice, a rule for a new trial is never granted to a party for any miscarriage of his own; he may have a new trial on account of the default of a witness, or the default of a juror or of his attorney,

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but I think I may lay down the rule absolutely never where the default is clearly traceable to the party himself. In this particular case the plaintiff himself created all the difficulty. If he had held his tongue about No. 2 plug, or, at all events, if being compelled to say that there was such another plug in existence and that he had used it,—if he had not volunteered information about the effect of No. 1 plug, he might possibly have stood in a better position than he did before the jury; but, at the same time considering the way in which the question of the specification was brought before the jury both by the evidence and the summing up of the learned judge, I cannot think that that jury at all events would have come to a different conclusion. Therefore the judgment will be vacated and a nonsuit entered.

Solicitors for the Plaintiff: *Thompson & Hellicar.*

Solicitor for the Defendant: *W. E. Murphy.*

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NORMANBY COPPER MINING CO. v. CORFIELD AND OTHERS.

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Statement.

NORMANBY COPPER MINING CO., LIMITED *v.* CORFIELD AND OTHERS.

Demurrer—Company—Insolvent Company—Preference—Trustee—Principal and Agent—Surety—27 Vict., No, 4, sec. 165—38 Vict., No. 5, secs. 107--9.

Statement of claim of Plaintiff Co. alleged that P., G., S., & Pr. were directors of the Co., and were personally liable to the Bank of N.S.W. in the sum of £7,500. C., by the request of the directors, advanced the amount necessary to pay off the debt, and took as security for the repayment of the advance a mortgage of the whole of the Co.'s property for £3,500, and the joint promissory notes of P., G., S., & Pr., B. & W., for the balance. Two months afterwards C. foreclosed and sold the Co.'s property and out of the proceeds of the sale discharged his mortgage debt, and by the direction of the directors applied a portion of the remainder to the satisfaction of the debt secured by the promissory notes, and interest, amounting altogether to £4164. At the time of the sale and the application of the proceeds the Co. was to the knowledge of all the parties in a state of insolvency. Eighteen months afterwards an order was granted for the winding up of the Co., and an official liquidator appointed. The Plaintiff Co. claimed an account and a declaration of the rights of the parties respecting the proceeds of the sale, and that the payment of the £4164 was void.

C., in his statement of defence, alleged that with the knowledge of the directors of the Plaintiff Co. the C. Banking Co. advanced to him the money which he lent to the directors of the Plaintiff Co. under an agreement, the terms of which were known to the directors of the Plaintiff Co., and under which he was bound to deposit the mortgage and promissory notes with the Bank, and that they were so deposited; that the sale was effected in accordance with the agreement and the money applied as stated under the directions of the directors, none of it having been received by C., except a commission for his trouble.

Upon demurrer by Plaintiff Co. to this part of the statement of defence,

Held, that the allegations demurred to were not demurrable.

Upon demurrer by B. & W. to the statement of claim,

Held, that B. & W. having been merely sureties for C., and there being no suggestion of their having been parties to the alleged preference contained in the statement of claim, they ought not to have been made Defendants.

Upon demurrer by P., G., and S. to the statement of claim,

Held, that notwithstanding that it appeared by the statement of claim that the debt paid out of the proceeds of the sale was a debt of the Co., and that the petition for winding up the Co. was not made within six months after the date of the payment and application of the proceeds, the statement of claim was not on that ground demurrable.

DEMURRER.

STATEMENT OF CLAIM: — The Normanby Copper Mining Co., Limited, is a joint stock company, registered in Brisbane on the 10th day of April, 1872, under the provisions of *The Companies Act*, 1863.

2. The said Company, from the year 1872 to the end of the year 1874, carried on business under its memorandum and articles of association.

3. It is provided by the 73rd clause of the articles of association that it should be lawful for the directors for the time being, or any three of them, from time to time, as the requirements of the Company might in their opinion demand, to borrow for or on account of the Company any sum or sums of money they might think fit so that, however, such sum or sums of money did not in the aggregate exceed £4,000; and for securing the repayment of the money so borrowed or any part thereof, with interest, to mortgage the lands, hereditaments, and premises of the said Company, either alone or together, with plant, stock-in-trade, implements, and other property of the Company, and to give the debentures, bonds, or promissory notes of the said Company; and the directors, or any three of them, might give a receipt or receipts for any sum or sums of money so borrowed, which receipt or receipts should be a sufficient discharge to the person or persons advancing the same or any part thereof; and such person or persons should not be answerable or accountable for the loss, misapplication, or non-application thereof or any part thereof.

4. At the time next hereinafter mentioned the Defendants, Henry Palmer, Peter Graham, William Southerden, and James Pringle, were directors of the said Company, and together with the Defendants, James Edwin Brown, Forster Fitzherbert Nixon, and James Ferguson Wood, were personally liable to the Bank of New South Wales for the sum of £7,500, due by the said Company to the said Bank, and continued so liable until the same was paid off by the Defendant, Henry Cox Corfield, in manner hereinafter mentioned.

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5. Before the time next hereinafter mentioned the last named Defendants requested the Defendant, Henry Cox Corfield, to advance and lend to the said Company money sufficient in amount to pay off and discharge the said debt of the said Company to the said Bank, which the Defendant, Henry Cox Corfield, agreed to do upon having as security therefor a bill of mortgage of the land by the said Company for £3,500; a promissory note for £4,000, signed by the Defendants, Henry Palmer, James Edwin Brown, Peter Graham, Forster Fitzherbert Nixon, and James Ferguson Wood; a promissory note for £2,000, signed by the Defendants, Henry Palmer, James Edwin Brown, William Southerden, and James Pringle; and a promissory note for £1,500, signed by the Defendants, Henry Palmer, James Edwin Brown, Peter Graham, William Southerden, and James Pringle.

6. On the twelfth day of December, 1873, the Defendant, Henry Cox Corfield, advanced and lent to the said Company a sum of £7,500, wherewith was discharged the said debt of the said Company to the said Bank.

7. As security for the repayment of the said sum of £7,500 the Defendant, Henry Cox Corfield, received from the said Company a bill of mortgage, dated the nineteenth day of December, 1873, duly registered on the twenty-ninth day of December, 1873, under the provisions of *The Real Property Act of* 1861, and duly executed under the seal of the said Company, whereby certain pieces or parcels of land situate in the county of Bowen, being the land described in certificates of title, number 26712, register book, volume 189, folio 208; and number 26713, register book, volume 189, folio 209; and being the lands of the said Company, were mortgaged by the said Company to the Defendant, Henry Cox Corfield to secure the repayment of the sum of £3,500 on demand, and interest at the rate of £9 per centum per annum in the meantime; and a promissory note signed by the Defendants, Henry Palmer, James Edwin Brown, Peter Graham, Forster Fitzherbert Nixon, and James Ferguson Wood, for £4,000; a promissory note, signed by the Defendants, Henry Palmer, James Edwin Brown, William Southerden, and James Pringle, for £2,000; and a promissory note, signed by the Defendants, Henry Palmer, James Edwin Brown, Peter Graham, William Southerden, and James Pringle, for £1,500.

8. The said bill of mortgage comprised the whole of the assets of the said Company except certain chattels, subject to a bill of sale,

the equity of redemption whereon was of a nominal value only.

9. The money so advanced and lent by the Defendant, Henry Cox Corfield, together with interest thereon, remained unpaid at the time next hereinafter mentioned.

10. In the month of February, 1874, the Defendant, Henry Cox Corfield, in exercise of the power of sale vested in him by virtue of the said bill of mortgage, sold the said land comprised in the said bill of mortgage for the sum of £10,500, and received payment of the same, and transferred the said land to the purchasers thereof, who are now the registered proprietors thereof under the provisions of *The Real Property Act of* 1861.

11. The Defendant, Henry Cox Corfield, has received the whole of the said purchase money and has applied the residue of the same by the direction of the Defendants, Henry Palmer, Peter Graham and William Southerden, the then directors of the said Company, after discharging his said debt secured by the said bill of mortgage, in payment of his said debt secured as by the said promissory notes to the amount of £4,164.

12. At the time of the said sale and thereafter till the date of the order next hereinafter mentioned the said Company was insolvent and unable to pay its creditors, as was well known by the Defendants at the time of the application of the said residue, and such application was made by such direction as aforesaid in order to prevent the creditors of the said Company from having the benefit of the said residue in case of the said Company being wound up.

13. If the accounts hereinafter prayed are taken the balance will be found to be in favor of the Plaintiffs.

14. By an order of this honorable Court made in its Equitable Jurisdiction under *The Companies Act* 1863, on the twenty-eighth day of May, 1875, on a petition presented for its winding up on the twelfth day of May, 1875, the said Company was ordered to be wound up, and Frederick Bryant of Maryborough aforesaid has since been appointed official liquidator thereof.

15. The said Frederick Bryant, as such official liquidator as aforesaid, has disaffirmed and disallowed the said payment and retention of the said sum of £4,164, and has demanded payment of the same with interest at the rate of £——— per centum per annum from the date of the said sale by the Defendant, Henry Cox Corfield, to the said Company.

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16. The bringing of this action has been sanctioned by this honorable Court.

17. Since the commencement of this action the Defendant, Forster Fitzherbert Nixon, has been duly adjudicated insolvent, and a trustee of his property duly appointed.

18. By an order dated the fifth day of February, 1878, it was ordered that the proceedings in this action should be carried on between the continuing parties to the action and the trustee of the property of the said Forster Fitzherbert Nixon.

The material parts of the Plaintiffs' claim were:—

1. To have an account taken of what is due to them in respect of the balance of the purchase money received by the Defendant, Henry Cox Corfield, on the sale of the lands and premises comprised in a bill of mortgage made by the Plaintiffs, the Normanby Copper Mining Company Limited, in favor of the Defendant, Henry Cox Corfield, produced and registered on the twenty-ninth of December, 1873, numbered 32425, after deducting therefrom the moneys due to the Defendant, Henry Cox Corfield, thereon, for principal, interest, and costs; and for a declaration of rights of parties respecting the proceeds of the said sale; and that the payment of £4,164, part thereof, in payment of the debt of the Defendants, Henry Palmer, Peter Graham, William Southerden, James Edwin Brown, Forster Fitzherbert Nixon, James Ferguson Wood, and James Pringle, was void.

The statement of defence of the Defendant Corfield, was to the effect that, before he was requested to advance the money, a similar application had been made to the manager of the Maryborough branch of the Commercial Banking Company of Sydney; and that this Company advanced the money to Corfield by way of an overdraft in order that he, on his part, might advance it to the Plaintiffs upon the terms, in addition to those mentioned in the statement of claim, that the Plaintiffs should pay bank interest for such part of the money as was not secured by mortgage, and should also pay Corfield 1½ per cent. on the whole amount of £7500 by way of commission for his trouble in procuring the said money for the Normanby Company. In pursuance of an agreement with the bank—the terms of which agreement were well known to the directors of the Normanby Company—the Defendant Corfield deposited the mortgage with the Commercial Bank, and the makers of the promissory-notes handed them to the manager of the bank at Maryborough. The sale was also effected in accordance with this agreement, and the residue

before referred to applied by Corfield as directed by the directors of the Normanby Company, none of it, except the commission previously mentioned, being received by him. The Defendant Corfield did not admit that the company was at this time in a state of insolvency, and denied that he was aware of its inability to pay its debts.

The Plaintiffs demurred to so much of this statement of defence as related to the arrangement or agreement between the Defendants and the Commercial Bank on the grounds—(1) that the facts alleged therein did not show any ground of defence to the statement of claim, or any part thereof, to which effect could be given as against the Plaintiffs; (2) that it was immaterial to the Plaintiffs' case that the Defendant Corfield was a trustee for the Commercial Bank; and (3) that the Commercial Bank, not being necessary parties to the suit, matters relating to them formed no defence on the part of the Defendant Corfield.

The Defendants, Palmer, Graham, Southerden, and Pringle demurred to the statement of claim so far as it related to them on the ground that it appeared from it that the debt of the company referred to therein at the time of the payment and application by way of payment in satisfaction and discharge thereof was a valid and subsisting debt of the said company, and that the company was liable in respect thereof, and as it did not appear from the statement of claim that the petition for winding-up the company upon which the order for winding-up the same was made was presented within six months after the date of the said payment and application, but, on the contrary, it did appear from the statement of claim that the said petition was not presented within six months after the said payment and application, and was not presented for fifteen months after such payment and application by way of payment, the same was a good and valid payment, and the Plaintiffs could not afterwards dispute the validity of the said payment and application, or recover back the money, or any part of it, then paid and applied in satisfaction and discharge of the said debt.

The Defendants Brown and Wood also demurred to the Plaintiffs' statement of claim on two grounds, the first being—that the statement of claim sought relief against them on the ground of a fraudulent preference under section 65 of *The Companies Act of* 1863 (27 Victoria, No. 4) and *The Insolvency Act of* 1874, sections 107, 108, and 109, whereas in fact no such fraudulent preference as against these Defendants was disclosed on the said statement of claim. The second

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ground was similar to that upon which the demurrer of Palmer, Graham, Southerden, and Pringle was based.

The Attorney-General and *Harding* for the Plaintiffs cited Gaslight Improvement Co. *v.* Terreet (L.R. 10 Eq., 168); Skye's case (13 Eq., 255); Marks *v.* Feldman (5 Q.B., 275); Allen *v.* Bonnett (5 Ch., 577); Marks *v.* Feldman (L.R. 5 Q.B., 275); Pullen *v.* Tucker (4 B. and Ald., 382); *Re* the Exhall Coal Mg. Co., (35 Beav., 439); German Mg. Co. (4 De G. M. and G., 19); Boyce on *Ultra Vires*, 526.

Pring, Q.C., Garrick and *Real*, for the Defendants, cited *The Companies Act* 1862, sec. 165; *Insolvency Act* 1874, secs. 107, 108, and 109; *Insolvency Act* 1864, sec. 72; Ritson on Bankruptcy, 2nd edition, p. 135; *Ex parte* Blackburn *re* Cheeseborough (L.R. 12 Eq. 358); Pooley Hall Colliery Co. (21 L.T., 690).

CORFIELD'S DEMURRER.

Judgment.

COCKLE, C.J.:—In this case we may I think start with the supposition that there was an unimpeached and unimpeachable debt due to the Bank of New South Wales, and taking first the allegation in the statement of claim that Corfield advanced the money for the purpose of paying off that debt and substituting himself as a creditor, that would undoubtedly technically, and in strictness and following the words of the statement, be a borrowing of money—a loan of money. But looked at more narrowly, its true nature seems to be this: that it was a paying off of the debt of the Normanby Copper Mining Company, a perfectly good debt, and a placing on the statement of claim of Corfield himself in the position of an equitable creditor to the amount. At the time of this transaction—this transfer we will say—there was no other creditor of the company; the existence of such creditor is not stated, at all events, and consequently paragraph 8 of the statement of claim becomes destitute of significance so far as that time is concerned. Moreover, it is not alleged that at the time of this transaction there was any contemplation of winding up the company. That being so, let us see what appears on the statement of defence relative to this transaction. It rather enlarges—it is not inconsistent with what appears on the statement of claim, but it enlarges, expands, and to some extent explains the transaction of the transfer. It might be said, Well, what is that to us? What have we to do with that? It might be so did it not appear on the defence itself that there was a knowledge on the part of the company, or on the part of those who must be taken to represent the company, of the transaction. For in paragraph 4 it is stated, "The directors

"of the Normanby Copper Mining Company Limited and all the "other defendants to this suit were at the time when the defendant "lent the said money to the said company, and have ever since been, "well aware of the matters and things in the last preceding paragraph "set out." And on looking back to the last preceding paragraph you see there the explaining circumstances under which the transfer of liability was made. Then surely the parts of the transaction set up by the defence are as important for consideration as that part which is set up by the statement of claim; and it is very possible, though not necessary to go into the point, that different liabilities might arise in respect of the Commercial Bank at Maryborough, the defendant Corfield, and the defendants, the rest of the directors. It might possibly become a question whether even supposing Corfield or one or more of the directors of the company were aware of such a state of things, whether the position of the Commercial Bank would be altered. It is unnecessary to go into that; suffice it to say, and it would sufficiently appear that this sets out material facts tending to show the true nature of the transaction, and consequently cannot be regarded as insignificant. Therefore, the Court cannot in the present state of things, when as yet the facts are untried and unproved—the Court cannot now, at all events, give effect to the demurrer, and the proper course will be to reserve to the plaintiffs the benefit of the demurrer to the hearing. All questions of costs will follow that.

DEMURRER OF BROWN AND WOOD.

COCKLE, C.J.:—Now it distinctly appears upon the face of the claim that Brown and Wood are only actors in this transaction in so far that they are sureties to Corfield who advanced the money. It is not, at all events, in the present stage of the case the business of this Court to decide upon a question which may arise either between these two sureties *inter se*, or between the two together and Corfield. And moreover, they being sureties to Corfield it is difficult to see what possible order this court could make against them in this suit. And if we turn to paragraphs 11 and 12 of the statement of claim, we see that while there is an allegation that the then directors of the company directed so and so to be done with the proceeds of the sale, yet as against the defendants Brown and Wood there is no suggestion whatever that they were at all events parties to, or privy of, the actual preference, and certainly no allegation that they ever handled the money or knew of it. By paragraph 12—"At the time of the "said sale and thereafter till the date of the order next hereinafter

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"mentioned the said company was insolvent and unable to pay its "creditors, as was well known by the defendants at the time of the "application of the said residue, and such application was made by "such directors as aforesaid," &c.—that is to say, by the direction of the directors who did not include Brown and Wood, and consequently I think that this demurrer must be upheld and judgment given for the defendants. Leave to amend on usual terms, otherwise judgment for these defendants.

DEMURRER OF PALMER, GRAHAM, SOUTHERDEN, AND PRINGLE.

COCKLE, C.J.;—In this case there was a suggestion made that the effect of certain clauses in the Insolvency Act would be to protect the defendants, bnt there are facts here which will have to go to the jury. It is sufficient to say that if the alleged unlawful or undue act in the present case took place, it may have taken place under such circumstances that it may defeat, delay, or circumvent. Therefore, I think that no advantage can be taken of that. As to the rest, it appears from paragraph 11 of the statement of claim that the application of the residue of the purchase money was made by the direction of the defendants, Palmer, Graham, and Southerden. It is an important circumstance to note that in the 11th paragraph of the statement of claim the name of Pringle does not appear, and it appears that he was only a director at the time of the deed. Then, so far as the three defendants, Palmer, Graham and Southerden, are concerned, it appears they gave directions respecting the application of this purchase money, and that at the time it was well known to the three defendants that the company was insolvent, and the thing was done in order to prevent the creditors of the company from sharing fairly in the assets. Under these circumstances, so far as these three directors are concerned, the demurrer must be overruled, while as to the defendant Pringle, the judgment must be for him. Leave to amend on usual terms as to defendant Pringle.

LUTWYCHE, J.:—It is unnecessary for me to say anything with regard to the first two cases which have been disposed of by the Chief Justice. With regard to this one I need only remark that the position of the four directors is, as it appears now, decidedly different. Pringle is precisely in the same position as to sureties Brown and Wood, and therefore entitled to the same advantage. The demurrer with regard to him will be sustained, and with regard to the other three defendants, there must be judgment against them.

Solicitor for the Plaintiffs, *Lyons, Maryborough, by his agents, Hart and Flower.*

Solicitor for Corfield, *Barnes, Maryborough, by his agents, Lyons and Chambers.*

Solicitor for Palmer, Graham, Southerden, and Pringle, *P. Macpherson.*

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RE WILLIAM DEVINE.

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July 26.

Insolvency.—Execution Creditor.—Withdrawal of Sheriff.—Sum less than £50.—38 Vict. No. 5, secs. 102, 105.

Statement.

The Sheriff having taking possession of goods under a writ of *fi. fa.* for a sum less than £50, the Defendant on the following day was adjudicated an insolvent. The costs of possession raised the amount due under the writ above the sum of £50. On a motion to compel the Sheriff to withdraw from possession, and that the goods might be given up for the benefit of the creditors of the insolvent,

Held, that the sum directed to be levied being under £50, secs. 102 and 105 of *The Insolvency Act of 1874* did not apply, and the Sheriff could not be compelled to withdraw.

THE Australian Joint Stock Bank having signed judgment in an action against Devine, took out a writ of *fi. fa.* against his goods, the sum indorsed upon the writ being £49 18s. 7d. On the 22nd of July, 1878, the Sheriff took possession under the writ, and on the following day the Defendant was adjudicated an insolvent. The costs of possession added to the sum indorsed upon the writ raised it above the sum of £50.

Pope Cooper, on behalf of a creditor of the insolvent, moved absolute a rule calling upon the Bank to show cause why the Sheriff should not be ordered to withdraw, and the goods given up for the benefit of the insolvent's creditors.

The Attorney-General (S. W. Griffith, Q.C.) showed cause, and cited Slater *v.* Pinder (L.R., 6 Ex., 228).

Judgment.

LUTWYCHE, A.C.J., said he was of opinion that the costs of possession were not necessarily involved in the amount to be levied for. They might. But as the sum directed to be levied was only £49—being under £50—he thought the case did not come within the 102nd section of the Act; and although he had at first been impressed with the difficulty of the proviso of the 105th section, he thought, upon looking into the section and after hearing the Attorney-General, that proviso might be so construed as to be consistent with the terms of the 102nd section. Then the effect of the Act would be this—that, where the property taken under an execution was not less than £50, the

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sheriff was required to hold the proceeds of the sale for fourteen days, and if after that time no notice has been served upon him of the presentation of a petition in insolvency against the debtor, he is to pay over the amount to the execution creditor. Then came in the proviso attached to the 105th section, which was to the effect that if the proceeds have been paid over, that payment shall hold good unless at the time of payment the creditor had notice of the presentation of a petition for adjudication. Reading these two portions of the Act together, he thought that seemed to be the only effect which the proviso had. Consequently it would not apply to cases where the sum levied amounted to less than £50. He thought himself that the proviso was out of place, and that it should have followed the 102nd section. He accordingly discharged the order, but without costs.

Attornies for the execution creditor, *Little and Browne.*

Attorney for the plaintiff creditor, *C. Blakeney.*

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Statement.

RE R. HUGHES & CO.

Insolvency.—Liquidation.—Adjudication of Insolvency without Petition.—Procedure. Trustee.—Costs.—Insolvency Act 1874 (38 Vict. No. 5), sec. 202, sub-secs. 12 and 9; sec. 101, sub-sec. 1; sec. 203.

When it can be shown to the satisfaction of the Court that proceedings in liquidation are of a character which requires the interposition of the Court, it has power to adjudge a liquidating debtor insolvent.

One of two or more trustees in a liquidation cannot act without the others unless the creditors, on appointing them, direct that he may.

When a creditor feels aggrieved by an act of a trustee in a liquidation and appeals to the Court, he is, as a rule, entitled to his costs against the trustee if he succeeds.

IN the year 1876 the estate of the Defendants was placed in liquidation by arrangement. Two trustees were appointed by the creditors without any direction concerning the mode in which they were to act. Previously to the 23rd of May, 1878, a notice, signed by only one of the trustees, and convening a meeting on that date, was sent to the creditors. The meeting was held on the 23rd of May, 1878, and a resolution passed by a majority of three-fourths in value, but not a majority in number, of the creditors present and voting, which purported to discharge the debtors and release the trustees.

On the 20th of June, 1878, one of the creditors obtained a rule *nisi* calling upon the debtors and the trustees in the liquidation to show cause why the debtors should not be adjudged insolvent.

The Attorney-General (S. W. Griffith, Q.C.) now moved the rule absolute.

Harding showed cause.

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LUTWYCHE, A.C.J. :—An order *nisi* was obtained on the 20th of June last by James Gulland, a creditor of Richard Hughes and Jotham Blanchard, the members of the firm of Hughes and Co., calling upon them, and also upon Charles Powell and Thomas Edward White, the trustees appointed in proceedings for liquidation by arrangement, to show cause why Hughes and Blanchard should not be adjudged insolvent. A petition for an adjudication of insolvency against them had been previously presented by Gulland, but it was objected, on showing cause against the order, that the service of the copy of the petition was insufficient. That objection, however, whatever effect might be given to it in certain cases, falls to the ground when it can be shown to the satisfaction of the Court that the proceedings in liquidation are of a character which require the Court's interposition under the provisions of the 12th sub-section of section 202 of *The Insolvency Act of* 1874. If that be done, the Court has the power, *mero motu*, without the presentation of any petition, to adjudge a debtor insolvent. See *re* Ashton, Law Rep., 20th Equity, p. 777. The question for decision in the present case is whether the liquidation by arrangement can proceed without injustice or undue delay to the creditors. It was contended, on behalf of the trustees and of Hughes and Co., that the proceedings were at an end, the debtors having been discharged, and the trustees released by virtue of a resolution passed by the creditors at a general meeting held on the 23rd day of May last; the resolution also declaring that the close of the liquidation should date from the 27th day of May. But that resolution had no legal force. In the first place, the meeting at which the resolution was passed was not duly convened. The notice to the creditors was only signed by one of the trustees, and the two trustees were bound to act together, being one trustee in the eye of the Act (section 101, sub-section 1), in the absence of any declaration by the creditors at the time of their appointment that one of them might perform the act in question. But, further, the resolution itself was not a special resolution, as required by sub-section 9 of section 202. See also section 203, rule 237, and forms 104, 105, and 106. The report of the trustees set out that the resolution was carried by a majority in value of the creditors, and was in accordance with the terms of the deed of arrangement executed 9th May, 1876. The trustees appear to have mistaken the effect of this clause, which does not contemplate the statutory majority required for the purposes of granting a discharge of a debtor, releasing a trustee, and closing the

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liquidation. There was in fact an assenting majority of three-fourths in value of the creditors present at the meeting, and voting on the resolution, but not a majority in number. The whole of the proceedings at the meeting were therefore void, and the certificate of the registrar founded thereon was inoperative. Still, I should not feel called upon to exert the authority given to the court by the 12th subsection of section 202 if it were not apparent on the face of the proceedings in liquidation that any further delay in winding up the estate would work injustice to the general body of the creditors. When the estate of Hughes and Co. was placed in liquidation, there can be no doubt that the creditors were led to believe that the whole of the debts due to them, for which the debtors gave their promissory-notes, bearing 9 per cent. interest, would be paid in due course, allowance being made for renewals if the firm had time given to them. The estate has been in liquidation two years, and during the whole of that period, as I collect from the affidavits filed in the case, no dividend was paid to any of the creditors before the 23rd May last, and only a very small portion of the interest due on the promissory-notes. One of the trustees, Charles Powell, in the seventh paragraph of his affidavit, says:—"One dividend of two shillings and sixpence on a "third of the debts proved has been declared and paid by the said "trustees during our trusteeship." The last four words of the sentence are somewhat vague, and if it be intended to imply that any dividend was paid before the 23rd May last the suggestion does not appear to be borne out by the other facts in evidence. The seventh paragraph of Mr. Powell's affidavit goes on to say:—"No further "profit has been made by the said debtors, all the income of their said "estate from time to time having been paid and expended for wages "and advances in goods, money, and otherwise, in order to carry on "the said business as provided by the terms of the said deed." Taking this statement to be literally exact, the question immediately arises whether a business which has yielded so poor a result to the creditors while under liquidation is worth continuing under the present management. There is evidence of very lax supervision on the part of the trustees during the first half of the year following the execution of the deed of arrangement, and it is shown that Hughes and Co. entered into an agreement with a creditor named Picking, which amounted to a fraudulent preference, and that Powell assented to the agreement, and allowed it to continue in effect until an antecedent debt of £100 due by the firm to Picking had been reduced by

instalments of £3 a week by the sum of £82. As the law on the subject is clear, it is not worth while to examine in detail the excuses offered for its violation, but I must say that they fail to impress my mind by their weight. Upon the whole case I have arrived at the conclusion that the estate of Hughes and Co. ought to be wound up in insolvency, and the order *nisi* must be made absolute.

Concerning the question of costs I have not been able to find more than two cases which throw light on the subject, and one of these at first sight does not seem to have a direct application. In *ex parte* Royle, *in re* Johnson (Law Rep., 20 Equity, 780), the trustee had paid the costs of the solicitor out of the assets, which were afterwards found to be insufficient to pay the costs of the receiver, who was entitled to them in priority. The court made an order that the trustee should pay the receiver's costs personally. The principle deducible from this decision seems to be that the trustee becomes personally liable if he fails to carry out strictly the requirements of the Act, even when he is acting *bona fide*. The trustees in the present case do not allege that they have complied with the provisions of *The Insolvency Act of* 1874, but plead in justification that what they did was in accordance with the terms of the deed of arrangement executed May 9, 1876, which clearly could not be permitted to override the express enactments of a statute. *Ex parte* Angerstein, *re* Angerstein (Law Rep., 9 Chan., 479), carries the liability of a trustee still further, as it shows that a trustee may render himself personally liable for the payment of costs even when he does an act which he is expressly authorised by the statute to do. Under the terms of section 127 of the Queensland Act, a trustee may apply to the court for and obtain its opinion, advice, or direction on any question respecting the management of the insolvent estate, or his duty in connection therewith. In the case last cited, the court, dealing with a corresponding provision of the English Bankruptcy Law, held that applications of this kind are in substitution of actions at law, and if the application be unsuccessful the trustee will, as a rule, be ordered to pay the costs; and if the estate of the bankrupt is insufficient for payment of the costs, the trustee will have to bear the costs personally. By parity of reasoning when a creditor feels aggrieved by any act of the trustee, and appeals to the court, as he may do under section 125 of our Insolvency Act, I think he is entitled, as a rule, to his costs if he succeeds, and the trustees being in default, I order them to pay Gulland the costs of this application.

Attornies for the Plaintiff creditor, *Lyons and Chambers*.

Attorney for the trustees, *P. Macpherson*.

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A. W. L. BELL.

Aug. 6.

RE A. W. L. BELL.

Insolvency. — Proof of Debts. — Mutual Credits. — Dishonoured Bills paid by Indorser.—Insolvency Act, 1874 (38 Vict., No. 5) sec. 150.

Statement.

B., having indorsed over to a Bank promissory notes drawn in his favour by P., P. shortly afterwards went into liquidation. The Bank proved against P.'s estate on the promissory notes and obtained the amount of the composition on them. The balance, amounting to £337 3s. 1d., which remained due on the notes after payment of the composition, was paid to the Bank by B. B. was at that time indebted to P. in the sum of £126 5s. for accommodation acceptances made by P. in B.'s favour, leaving a balance of £210 18s. 1d. in favour of B. Subsequently proceedings in liquidation were instituted in B.'s estate, and P. sought to prove against the estate for a debt of £181 14s. 6d., which was admitted to be due unless the trustee was entitled to set off the £210 18s. 1d.

Held, that the trustee was so entitled.

HARDING moved absolute an order to vary or reverse the decision of the trustee of A. W. L. Bell's estate in liquidation, rejecting a proof of debt sent in by Powell on behalf of himself, as representative of the late firm of Powell and Gardner.

Prior to the 11th May, 1876, Bell had indorsed over to the Joint Stock Bank promissory notes to a large amount drawn by Powell and Gardner in his favour. On the 11th May, 1876, Powell and Gardner went into liquidation. The Bank proved against the estate for the amount of the promissory notes and obtained the amount of the composition on them, the balance remaining due being paid by Bell. Bell was at the same time indebted to Powell and Gardner in the sum of £126 5s. for accommodation acceptances made by Powell and Gardner in his favour, thus leaving a balance of £210 18s. 1d. in favour of Bell. In January, 1878, proceedings in liquidation were instituted in Bell's estate, and Powell proved against the estate for the sum of £181 14s. 6d. The trustee rejected the proof on the ground that he was entitled to set off the sum of £210 18s. 1d. against Powell's claim.

The Attorney-General (S. W. Griffith, Q.C.) opposed the motion, and cited Collins *v.* Jones, (10 B. & C., p. 777).

Judgment.

LUTWYCHE, A.C.J.:—This was a motion made on behalf of Charles Robert Powell, trading as Powell and Co., to vary or reverse the decision of Carl Harden, the trustee of Bell's estate, rejecting a proof of debt sent in by Powell on behalf of himself, as the representative of the late firm of Powell and Gardner. The affidavits filed disclose a disputed account; and not only are the affidavits conflicting, but the authenticity of documentary evidence is impugned. It was contended that the decision of the trustee in rejecting the

proof must be upheld, unless the court could plainly see that he was wrong. But I think that in cases like the present the court ought to be satisfied that he was right before affirming his decision. As appears from the affidavits, he had the opportunity of inspecting, and did inspect, Bell's trade books, but he had no opportunity of examining the trade books of Powell and Co. Unless, therefore, it can be collected from admissions made, or statements uncontradicted, that there is a complete answer to the claim made by Powell irrespective of the disputed matters of account, it appears to me that the only satisfactory course would be to send the questions of fact to be tried before a jury at the next October sittings of the Circuit Court at Maryborough, where it will be my turn to preside. The books on both sides could then be produced; the authenticity of the documentary evidence could be enquired into, and the witnesses could be cross-examined. (See *Insolvency Act* 1874, sections 23 and 24.) I think, however, that the motion before the court may be disposed of on its merits, without having recourse to so expensive a proceeding. The point to be determined is, whether the trustee of Bell's estate can set off a sum of £210 18s. 1d. against the claim made by Powell for £181 14s. 6d., which the trustee has refused to admit to proof. It is admitted on both sides that there were mutual dealings between the firm of Powell and Gardner and the firm of Bell and Co. prior to the 11th May, 1876, when proceedings for liquidation by arrangement or composition were instituted by Gardner on the behalf of his firm. It further appears from affidavits made by Bell and Harden, and not contradicted by Powell, that at the time of the composition by Powell and Gardner Bell was a large creditor of the firm, and that he had endorsed over to the Australian Joint Stock Bank certain promissory-notes and bills of exchange made and accepted by Powell and Gardner in favor of Bell; that the bank received promissory-notes to the amount of £561 8s. 3d. from Powell, who took over the assets and liabilities of the firm in payment of the composition of 12s. 6d. in the £; and that Bell was afterwards compelled to pay to the bank a sum of £337 3s. 1d., thereby making up the full amount of the sums due on the notes and bills endorsed by him to the bank. In the beginning of January, 1878, proceedings in liquidation were commenced in Bell's estate, and the trustee now admits that a deduction ought to be made in respect of accommodation acceptances in Bell's favor of £126 5s. from the sum of £337 3s. 1d., which would leave a balance of £210 18s. 1d., which he claims to set-off against the amount of Powell's proof. The

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Attorney-General, in his argument upon this part of the case, referred to the 150th section of *The Insolvency Act of* 1874, and cited Collins v. Jones, (10 B. and C., p. 777). Under that section it is provided that where there have been mutual credits, mutual debts, or other mutual dealings between the insolvent and any other person proving or claiming to prove a debt under his insolvency, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account and no more shall be claimed or paid on either side respectively. The bank having proved on the bills and notes in Powell and Gardner's estate, Bell's remedy under the composition was barred, as the rule is well established that an estate ought not to pay two dividends in respect of the same debt. See *in re* Oriental Commercial Bank, *ex parte* European Bank, (Law Rep., 7 Ch., App. 99). But the debt itself was not extinguished. Bolland *v.* Nash, (8 B. and C., 105,) shows that a bill which forms an item of credit on one side need not be in the hands of the party claiming it as an item of credit at the time of the bankruptcy. At the time of the composition in Powell and Gardner's estate there were mutual debts subsisting between that firm and Bell, and they had their origin in a mutual credit which had been previously created between them. Powell having only paid a dividend on what was owing by his firm, could not recover in an action the full amount of what was owing *to* his firm, nor can he prove for the full amount against Bell's estate in liquidation. He can only claim for a balance, and as the balacne is shown to be in favor of Bell's estate, I am of opinion that the decision of the trustee rejecting Powell's proof ought to be affirmed with costs.

Attorney for the Plaintiff, *P. Macpherson.*

Attornies for the trustee, *Jones and Brown.*

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Administration.—Executor.—Trustee.—Breach of Trust.—Waste.—Liability.—Accounts.

Statement.

S. by his will gave the profits of his real estate and of his horses and cattle for the support of M. his wife and his son T. until the latter arrived at the age of 21 years. The cattle and horses were then to be delivered to T. as his property, and at the death of M. the real estate also was left to T. The testator gave his executors power to sell any part of his real estate, or to borrow money on it, for the support of M. or T., or if they should think it desirable for the more effectual carrying out of his intentions; and directed that any instrument for conveying the fee simple, or for borrowing money by mortgage, was to be as valid as if he had executed it in his lifetime. H. and C. were appointed executors of the will. S. died during the minority of T., and from the time of his death until soon after T. attained his majority, the management of the property devised to M. and T. was mainly conducted by H., C. taking an active part in only two or three transactions, but from time to time receiving information from H. concerning the management. During the infancy of T. a portion of the real estate was mortgaged by H. and C., but it was alleged by C. that he never knew what became of the money. Another portion was leased to H. at an inadequate rent, and the estate was wasted to a considerable extent by T. with the knowledge of H. and C., neither of whom interfered to prevent it. After T. came of age he and M. executed a release discharging C. from all liability in respect of the trust, but no accounts were produced to them by H. or C. either before or at the time of the execution of the release.

Held that C. had accepted the duties of executor and was responsible for the waste of the estate.

That the *onus* lay upon the trustees to show that the property had been lawfully administered.

That the release ought to be set aside.

That T. was entitled to a full account in respect of the income and profits of the estate before as well as after the death of M.

THE statement set out that the Plaintiff was a legatee under the will of his father, who died, in 1864, during the minority of the Plaintiff, and the Defendant Cribb and Charles Humber, since deceased, (of whose heir the Defendant Elizabeth Humber was the widow) were the executors of the will. It alleged that the Defendant Cribb and Charles Humber had dealt improperly with the property devised to the Plaintiff, and claimed that a Release executed by the Plaintiff and his mother (who had a life interest in a portion of the estate) to the Defendant Cribb should be set aside, and the property improperly dealt with restored, accounts taken, and other relief granted.

Harding and *Power* for the Plaintiff.

The Attorney-General (Griffith, Q.C.) and *Real* for the Defendants.

Judgment.

LILLEY, J.:—It is conceded in this case that there must be judgment against the defendant Elizabeth Humber. The evidence establishes a sufficient case for judgment against the defendant heir,

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Charles George Humber; and, as the widow defendant does not admit assets of her deceased husband, the judgment will include an administration of his estate. The matter which remains for decision is, whether judgment should go against the defendant Robert Cribb, and, if so, how far it should extend. Henry Skinner died in September, 1864. By his will, after specific devises to his daughter and his wife, he gave the profits of his real estate and of his horses and cattle for the support of his wife and his son Thomas, the Plaintiff, until he arrived at the age of 21 years. At that period all the testator's cattle and horses were to be delivered to his son as his property, and at the death of his wife the remainder of his real estate was left to his son, the surviving plaintiff. He gave power to his executors to sell any part of his real estate, or to borrow money on the same, for the support of his wife or son, or if they, his executors, should think it in their judgment desirable for the more effectual carrying out of his intentions; and any instrument for conveying the fee simple or for borrowing money by mortgage was to be as valid as if he had executed it in his lifetime. He appointed the defendant Robert Cribb and Charles Humber (since deceased) executors of his will. At the the time of his decease Skinner's property, exclusive of specific devises, consisted of cattle, an allotment at the corner of George and Turbot Streets, Brisbane, some stock-in-trade, and, it is alleged, of allotment 50 at Milton. Probate of the will was taken out by the defendant Cribb and Humber. The stock-in-trade was sold, and the money received by Humber. Mr. Cribb alleges that the estate was insolvent, but in the absence of any reliable, or indeed of any accounts of the position of the estate at the time of the death, and of any other proof, I am unable to say whether, as a matter of fact, the estate was insolvent or not. Humber was most active in the administration of the estate, and Mr. Cribb asserts that he interfered in no way as executor except in assisting the administration by giving his promissory-notes to Humber with a view of their being discounted at the bank and money raised for the purposes of the estate. It appears, however, that he was cognizant of the letting of the cattle and the allotment at Milton to Stone, a son-in-law of Humber; it appears also from his own statement that he afterwards actually assented to and signed a lease of the cattle and premises to Powell; he was aware also of the sale by Davidson, and of the receipt of the money by Humber; he also settled with Dowse, a creditor, in respect of a claim of his against the estate. Humber used to tell him from time to time what he was

doing, and he was satisfied. These appear to have been the only acts of his connected with the executorship. He states, however, that he heard the boy—that is, the plaintiff—was selling all the cattle; that he took no steps to prevent it; that he said he (the plaintiff) was only anticipating what he would have by-and-bye; that he knew by the will the plaintiff's mother had a life interest in the cattle; that the mother and son did it together; and that the plaintiff was not of age then. It was the intention of the testator that the cattle with their increase should be managed and preserved for the plaintiff until he became of age, except so far as it might be necessary to dispose of them for the support of his wife and child. Mr. Cribb accepted the duties of the executorship, and it appears to me that he was not entirely passive in that respect. It is the clear duty of a person in his position, under such circumstances, when he hears that the estate is being wasted, even if it be by the *cestui que trust*, to interpose his authority and to take the most active measures to prevent the estate being sacrificed and the intentions of his testator frustrated. It is especially so when, as in this case, the *cestui que trust* to be ultimately benefited is a youth under the age of 21 years. It cannot be doubted that Mr. Cribb knew that he was a young lad with little or no education. His father died when he was about 13 or 14 years old, and the executors seem to have taken no trouble to give him the least measure of education. Under such circumstances I think Mr. Cribb was guilty of a breach of his duty, for which he must he held responsible. The next question which I have to decide is whether the Milton allotment, No. 50, formed a part of the testator's estate. Mr. Cribb claims it as his own property, in support of which contention his evidence is, that some time before the death of the testator there was a considerable debt owing to Cribb by him, that he (Cribb) bought the allotment in satisfaction of his debt, which was the consideration for the purchase; that he sold portions of it before it had been conveyed to him; that in the June preceding the death of the testator an application to bring the George Street allotment and the Milton allotment under the Real Property Act—the first in his own name, and the latter in the name of the defendant Cribb—was made by Skinner. A certificate of title was issued to Cribb in respect of the Milton allotment, and upon that he claims to be the registered proprietor. He asserts also that at the time the cattle and the allotment were let to Stone, Stone was told that the land belonged to him (Cribb); also, that at the time the cattle and land were leased to

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Powell, the lease contained a recital that the property belonged to Cribb; he also says that at the time of the purchase it was arranged that he should allow Skinner to occupy the land until he, the defendant, wanted it, and that after the death he permitted the widow to continue in occupation of it as a matter of charity. It is incumbent then upon the plaintiff to show that the certificate of title can be impeached on the ground of fraud. If the plaintiff has shown that the transaction was in fact not a sale, but that the land was placed in the name of Cribb either as mortgagee, as security for a subsisting debt, or as a trustee, and that Cribb is now asserting a title to a part of his testator's estate, which does not rightfully belong to him, then the plaintiff must succeed. In support of the plaintiff's case it is shown that six or seven weeks before the death of the testator, which would be after the time when he had signed the application to bring the land under the Real Property Act in Cribb's name, the testator sold a portion of allotment 50 to Richard Wynn, that he put him into possession of it, and that Wynn put up a house upon it and some fencing, and that Wynn was dispossessed of the land by the executor Humber. The plaintiff also relies on the fact that the cattle and land were leased by Cribb and Humber to Stone—also to Powell. In reply to these facts Mr. Cribb has asserted that these parties were told that the land was his. Stone confirms this, but Powell says he was told the land was Mrs. Skinner's and that there was no lease in writing to him. The plaintiff also relies upon the continued occupation by his father, and by his mother and himself until her death since the commencement of this action, nearly thirteen years' possession, and on the receipt of rents from the tenants during the brief intervals when that occupation had temporarily ceased. The plaintiff has also deposed that he heard from Humber of some agreement between his father and Cribb relating to the land; that Humber told him he found a paper among those he got in his father's house, saying that Mr. Cribb would transfer him the land back when he paid him; he also said that in a letter from Humber to him, at Bowen, Humber wrote that he wanted him (the plaintiff) to come down, and said that he held a paper from Mr. Cribb, and that he found this paper from Mr. Cribb among the other papers. That paper is not found in the possession of the widow of Humber. We are left to infer that it was the paper referred to by Humber in his conversation with the plaintiff. Mr. Cribb has denied that there was any such arrangement. He admits, however, that he would have

been willing to retransfer to Skinner on payment of his debt. No release, receipt, or discharge for the debt was given by Cribb to Skinner, and indeed the defendant Cribb describes the liability as "an unascertained total of dealings." In 1867, Cribb became insolvent, and did not return allotment 50 as part of his real estate. His official assignee entered transmissions on the registry, but not apparently from any information given by Mr. Cribb. Putting aside all the evidence, which is merely hearsay, or the sayings of the parties themselves, we have two instruments in evidence inconsistent with each other—the certificate of title in the name of Cribb, and the schedule of his real estate filed in his insolvency in August, 1867. That schedule is verified by an affidavit that it contained "a true and "complete statement and list of all real and personal property what-"soever and wheresoever, in possession or contingency, which he then "had or was entitled to, and the value of the same." This property (allotment 50) is entirely omitted from that list. At that time Mr. Cribb was under a moral and legal obligation to make a full disclosure and discovery of his estate upon oath. He made the necessary affidavit duly sworn, and made no claim of ownership in allotment 50. There are facts in this case consistent with that omission, and I must take his oath made only three years after the testator's death to be true in substance and in fact. I must, however, take it to be probable as against the testator and those claiming under him that there may be some money due to the defendant on the security of the allotment. I have no evidence to rebut the probability that the certificate was issued to Mr. Cribb to secure what might be ascertained to be due to him. I think therefore that the certificate has been displaced as an absolute conveyance by the plaintiff's evidence, and must stand as a security. Allotment 50 then must be held to have formed a part of the testator's estate at his death. Mr. Cribb will stand in the position of mortagee of that allotment for such sum as he can prove to have been due to him at the time of the application to bring the land in his name under the Act, with interest at current rates from that date until the commencement of this action, when he first made an adverse claim to be owner and not mortgagee. After obtaining probate, the defendant Cribb and Humber assumed the duties of trustees of the realty under the will, and caused a transmission of the estate to them to be registered under the Real Property Act. They jointly mortgaged the allotment in George Street on two occasions, although Mr. Cribb alleges that the mortgage monies were received and dealt with

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by Humber alone. As we have no accounts from these trustees showing either the receipt or disposal of the whole of the mortgage monies, or indeed of the disposal of any of those monies, I am unable to say whether, as a matter of fact, this statement is true. It is sufficient, however, that they jointly acted, and I think the circumstances show that a joint responsibility arose in respect of the receipt and application of the mortgage monies. So far as the advances from Mr. Darvall and Miss Connah are concerned, I think this is beyond question. There was also by Cribb and Humber a clear breach of trust in granting a lease of the George Street property to Humber himself at what I think, from the evidence, was an inadequate rent. Mr. Cribb rests his defence finally on a release executed by Mary Skinner the widow, and the plaintiff, Thomas Henry Skinner, dated the 10th June, 1874. That instrument recites that Cribb is desirous of being discharged from the trusts of the will of which he was trustee and executor jointly with Humber, and further that the accounts of the estate had been kept by Humber, Robert Cribb not having actively interfered therein, as the parties thereto admitted, and having examined the same accounts, declare them satisfactory. It appears to me, that the recital, so far as it relates to the examination of the accounts by the parties to the instrument, is wholly untrue. The only account which appears to have been kept was the book No. 3, and that is in some respects untrue, in other respects inaccurate, entirely deficient as an account, and at no period of the trust does it appear to me that the position of the estate could have been ascertained from that book. Beyond a statement by Mrs. Humber that on one occasion sometime before the execution of the release, but when, we are not told, Mrs. Skinner and Charles Humber were conversing together, and that there were accounts on the table before them, but what accounts she could not say, there is not the slightest evidence that at any time before the execution of the instrument, and certainly not at the time it was signed, any one of the parties—either Cribb, Mary Skinner, the plaintiff, Thomas Skinner, or even Charles Humber himself—had examined the accounts and declared them to be satisfactory, or that there were any materials before them from which such accounts could have been constructed. Mr. Cribb never saw an account, either perfect or imperfect, of the state of the trust, and the plaintiff has declared the same. Now I find that at the date of the execution of the alleged release there had been a waste of the entire *corpus* of the testator's estate so far as it consisted of cattle and horses; there had also been a breach

of trust by the granting of the lease of the George Street property to Humber. I find thus that the plaintiff had no opportunity afforded him of ascertaining in what way the executors and trustees had discharged their duty, nor had he any reason to believe then that defendant Cribb intended to assert an absolute right of property in allotment 50; he had no means of knowing to what extent his interest in the realty had been affected by their exercise of the power of borrowing; he was aware, of course, of the waste of the cattle; he was aware also of the lease of the George Street property to Humber, but he had no independent legal advice either at the time of confirming the lease or of the execution of the release, and there is not the slightest evidence that he had any knowledge of his rights in respect of these breaches of trust; he was, and I think it is clear it was known to his trustees, a young man of dissipated habits—indeed, his trustee, Humber, seems rather to have encouraged than restrained him in his dissipation—he was merely able to write his name, he was unable to read writing, and it seems to me no explanation whatever was given to him of the real nature and effect of the instrument he was executing on the 10th June. The instrument was prepared apparently on instructions given by Humber, Mr. Cribb was satisfied with the form of it, and neither Humber nor he appear to have given any information to their *cestui que trust*, the plaintiff. It was executed by all parties in the presence of witnesses unskilled in the law and, so far as I can see, incapable of giving any explanation of the instrument. Indeed, the only witness called described it as a release from Humber to Cribb, and it was executed by the plaintiff and his mother, not in a place of business, but in a public-house, and in the presence of the son-in-law of one of the trustees. Mr. Cribb made no enquiry as to how the agreement to release him had been obtained. Of the probable degree of openness and fairness with which the plaintiff was treated by his trustees, and of the likelihood of his receiving full information of the state of the trust, we may form some idea from the observations of defendant Cribb to his co-trustee Humber after the execution of the release just as his release was signed :—"I said to him" (Humber) "I "have just been crucified about another estate by two boys. Take my "advice; Tom is of age, has been of age some years, his mother is very "old, by the two joining together you can come to a settlement with "them without any trouble. *Pay them what they want*, or what is "reasonable, and have done with it." I think it is impossible to avoid the belief that Mr. Cribb felt or suspected, if he did not know, that

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the dealings of his co-trustee with the trust property were not perfectly clear and correct. It is not the language of a trustee who knew that the parties most deeply interested had "examined the accounts and "declared them to be satisfactory." The release, therefore, will be set aside. The release did not operate as a transfer of the legal estate under the Act by Cribb to Humber, but subsequently Mr. Cribb executed a nomination of trust making Humber the sole trustee. By this act, combined with the words of conveyance in the release, he placed the entire management and disposal of the realty in the hands of Humber. This appears to me to have been a breach of trust, looking at all the circumstances of the case. It placed the estate in peril, as we shall see from the acts of Humber immediately after he had obtained this power. For on the 20th August, 1874—that is, in little more than two months after the execution of the release, he mortgaged the George Street property to Mr. Garrick for £700, depriving himself, as mortgagor, of the protection given by the 57th sec. of *The Real Property Act of* 1861 by declaring that the mortgagee might exercise the power of sale immediately or at any time after default without giving any notice whatever; and on the 31st March, 1876, he further mortgaged the same property, jointly with other property of his own, for £500, declaring that the power of sale might be exercised after default by giving one day's notice in writing to him as mortgagor. How or in what way the trustee Humber disposed of these sums, amounting to £1200, there is no evidence to show. Had the request of the plaintiff and his mother been complied with, the addition to the existing mortgage sum would at that time have made the total mortgage moneys only £500. The Attorney-General has contended that there is no evidence of a misapplication of the mortgage moneys. This can be easily understood, because the parties liable to account furnish none, and appear to have kept none, and the disposition of the money, its application or misapplication, would be best known to themselves; it was clearly impossible that the plaintiff could afford any evidence on this point. But when persons who pledge the estate which they hold in trust fail to render any account, or to show a lawful disposal of the money, they must be held liable to make good the money that they are unable to show they have properly used. Whether there has been a misapplication of these mortgage moneys will depend upon the proof the trustees may be able to give of their having disbursed them for the benefit of the trust, but it cannot be held that the absence of any proof of misappropriation can relieve them from their duty to

account and show a lawful application of the funds, or from the consequences of the breach of trust if they have misapplied the funds. One of the reasons which defendant Cribb has given for desiring to be released from the trust in June, 1874, is that, having been requested by the plaintiff and Mrs. Skinner to borrow a further sum of £100 on the mortgage of their property in George Street, he had refused to accede to that, saying "I will not do it at all; if you want this done, release me, "and then you can do as you like;" he has also said that he did not consider it prudent to join in raising more money. He, knowingly, therefore, gave power to his co-trustee to commit any breach of trust he liked. Whether the mortgage by Humber to J. G. Cribb was to raise money for his own purposes or for the benefit of the estate, it is impossible upon the evidence to say, but the probability is that it was for his own use, inasmuch as he pledged his own property jointly with the trust estate. No separate account of the trust estate or moneys seems to have been kept by Humber, and no separate account of capital as distinguished from income—in fact, no account whatever seems to have been kept from which either the *cestui que trust* or his legal adviser, if he had had one, could have known the state of the trust. It has been contended for the defendants that in respect of income or profits of the estate during the lifetime of Mrs. Skinner, the plaintiff has no right to complain, and indeed is not entitled to either enquiry or account. I disagree entirely with this. Looking at the terms of the will and the power given to the trustees to use the capital if necessary for the support of Mrs. Skinner and her son, the plaintiff, and looking to the fact that the trustees have actually encumbered the *corpus* of the realty, and dissipated the personalty, and used or permitted the proceeds to be used in some way unknown, I think the plaintiff is entitled to a full account in order to show in what way their conduct in dealing with the *corpus* of the estate to which he was entitled at the age of 21 in respect of the cattle, and at the death of his mother in respect of the realty, has reduced the quantity and value of his estate under the will—if their conduct did really result in any loss to him. As to that of course there must be an enquiry. There will be interest allowed on all sums retained or misapplied, or not shown to have been lawfully applied. And with regard to costs, I see no reason why the estate of Henry Skinner should bear the costs of this protracted and expensive litigation. The costs of this suit therefore must be paid by the defendants. Judgment will, therefore, be given for the plaintiff for his claim, modified where necessary by the conclusions I have herein stated.

Attorneys for the Plaintiff, *Roberts, Liddle and Roberts.*

Attorney for the Defendant, *P. Macpherson.*

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WHITEHEAD AND OTHERS v. SUNLEY.

Demurrer.—Lien.—Continuous Possession.—Statement of Defence.—Specific Denial. Judicature Act (40 Vict., No. 6), ord. 19, r. 10.

Aug. 19.

Statement.

The Plaintiffs claimed goods which had been carried in the Defendant's ship, and were alleged to be detained by him from the Plaintiffs. The statement of claim stated that the goods had been delivered by the master of the ship to the Plaintiffs, but were afterwards retaken by the Defendant. The statement of defence set up a right of lien in the Defendant, and denied generally the facts alleged in the statement of claim, but did not deny specifically that the Defendant's possession of the goods had been interrupted.

Held that the interruption of possession ought to have been specifically denied.

DEMURRER TO STATEMENT OF DEFENCE.

BY the statement of claim it was sought to recover goods of the Plaintiffs' imported to Rockhampton in the Defendant's ship, and alleged to be wrongfully detained by him. It stated amongst other things that the goods had been delivered to the Plaintiffs by the master of the ship, but had afterwards been retaken by the Defendant. The statement of defence set up a right of lien over the goods in the Defendant, and denied generally the facts alleged in the statement of claim, but did not deny specifically that the goods had been given up by the master.

The statement of defence was demurred to on the ground that it did not show a continuous possession of the goods in the defendant from the time that the right of lien accrued.

Harding in support of the demurrer.

The Attorney-General (S. W. Griffith, Q.C.), Pring, Q.C., and *Garrick*, for the Defendant.

Judgment.

LILLEY, J.: The defendant's ship arrived at Rockhampton with goods belonging to the plaintiff, subject to a lien to the defendant. The plaintiff alleges in his statement of claim that on payment of freight, duties and charges the defendant's master gave possession of the goods to the plaintiff's agent. The statement of defence sets up the lien, and it is demurred to on the ground that it does not show a continuous possession of the goods by the defendant—that, in fact, it is consistent with a loss of the right of lien by parting with the possession, as shown by the plaintiff's statement of claim; as the record stands this is a material allegation. Paragraph 9 of the defence, which alleges the detainer of the goods, does not show a continuous possession as against the positive averment of the plaintiff that there had been a change of it into the hands of his agent. The defendant relies, however, on paragraph 14 of his defence, as a denial or non-admission of

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the change of possession. That paragraph is as follows:—"Except as "hereinbefore appears, the defendant does not admit all or any of the "statements and allegations in the statement of claim contained." By order 19, rule 19, of our *Judicature Act*, it is declared that, "It shall not be sufficient for a defendant in his defence to deny gene- "rally the facts alleged by the statement of claim . . . but each "party must deal specifically with each allegation of fact of which he "does not admit the truth." Paragraph 14 of the defence violates this rule, and upon the cases cited at the bar, to which I would add Harris *v.* Gamble, 47 L.J., N.S., Ch. Div. 344, I hold it is insufficient. The result is that the defence fails to meet the plaintiff's allegation of the parting with the possession of the goods, which, under rule 16, order 19, must be taken to be admitted; and upon the whole record this would entitle the plaintiff to judgment. As this is, however, the first case of the kind under our Act, and as it is probably a mere slip in pleading, there will be judgment for the plaintiff, unless the defendant amend, for which I give leave, and pay costs within seven days.

Attorneys for the Plaintiffs, *Rees, Jones, and Brown.*

Attorneys for the Defendant, *Daly and Abbott.*

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SKINNER v. CRIBB AND OTHERS.

Sept. 10.

Appeal.—Costs.—Judicature Act, ord. 54, r.r. 1, 2.

The Court has full discretion to direct security for the costs of an Appeal to be given.

Statement.

THE Defendants, having been unsuccessful in the Court below, gave notice of appeal to the full Court.

Harding (*Miller* with him), for the Plaintiff, applied for an order that the Defendants should give security for the costs of the appeal.

The Attorney-General (*S. W. Griffith, Q.C., Real* with him), for the Defendants, opposed the application.

Judgment.

LUTWYCHE, A.C.J.:—I think that in this case the application made by Mr. Harding that the defendants should give security for the costs of the appeal ought to be allowed. The terms of order 54 of *The Judicature Act*, rules 1 and 2, seem to me to give the court a discretion as to costs in all the proceedings of the court. The words of rule 1 are "subject to the provisions of this Act the costs of and "incident to all proceedings in the court shall be in the discretion of "the court." No words can be wider, and I see no reason why we

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should be called upon to limit them further than the limit contained in the rule itself. Then, if there is a discretion in the case, the second rule says "In any cause or matter in which security for "costs is required the security shall be of such amount and be given "at such time or times and in such manner and form as the court or "a judge shall direct." Now what is the meaning of "in any cause "or matter in which security for costs is required." The Attorney-General argued that these words only applied to cases where by the previous practice of the court security for costs was required, and that, he contended, was confined to the case of a plaintiff, but the words of the first section sweep away, it seems to me, all the law on the subject of giving security for costs, and leave the power in the discretion of the court. Then, if the court in its discretion requires security before the appeal shall be proceeded with, the security is to be of such amount and is to be given at such time or times as the court or a judge shall direct, no absolute amount being fixed. As it seems to me the court has discretion, the question arises whether this is or is not a case in which there should be security in favor of the applicant. I think there are special circumstances which justify the court in directing that security should be given. In the first place there is the language used by the defendant stating he would do all he could to get out of the judgment. In the judgment given by the learned judge on the motion for the stay of proceedings it appears as a part of his order that two releases which were produced in the course of the cause were ordered to be impounded because they had been fraudulently obtained. And if a defendant is by the judgment of a court of competent jurisdiction, yet of force, declared to be guilty of fraud, I think it is the bounden duty of the Court of Appeal to take care that no further injury is done to the party who is the victim of the fraud of which the defendant has been guilty. Then this is virtually a second appeal, bringing it still further within the authority of Clark *v.* Roach. First the defendant appealed to the learned judge himself, and tried to stop any further prosecution of the cause, and when the motion had been heard, and the matter had been decided against him, then he appeals against not only the judgment given at the hearing but also, as I understand, against the order in respect of the motion for staying the proceedings. Under all these circumstances I think the court is bound to take proper precautions, and to see that the plaintiff is no further damnified than he has been already by the conduct of the defendant in this cause. I am, therefore, of opinion

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that an order should be made requiring the defendant to give security for £200 costs before he be allowed to proceed with the appeal, or that he pay that amount into court.

LILLEY, J.:—I agree with the judgment which has been given by the Acting Chief Justice. Another special circumstance which ought not to be lost sight of by the court is, these are trustees who have been found by the judgment of the court to have been defaulters and non-accounters for a period of fourteen years. I think, therefore, it is time they should be required to give some security that in the event of failure the costs will be paid. With regard to the difference between our statute and the rule in the English Judicature Act, I think that arises from the fact that the English draftsman was a little more minute and careful in the preparation of his rule.—I mean that proviso in the rules which refers to the deposit the court may require.

Attorneys for the Plaintiff, *Roberts, Liddle and Roberts.*

Attorney for the Defendant, *P. Macpherson.*

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Sept. 13.

Statement.

Demurrer.—Lien.—Continuous possession.—Possession of agent.—Warehousekeeper.

A lien is destroyed by entrusting the goods over which the lien is claimed to an agent, unless he be a gratuitous bailee.

THE statement of claim claimed the recovery of goods of the Plaintiffs carried to Rockhampton in a ship of the Defendant, and alleged by the Plaintiffs to be wrongfully detained from them by the Defendant. It stated amongst other things that the goods had been given up to the agent of the Plaintiffs by the master of the ship, but had afterwards been retaken by the Defendant. The statement of defence set up a right of lien over the goods in the Defendant for general average and freight. It denied that the alleged agent of the Plaintiffs was their agent, and stated that he was the agent of the Defendant, to receive the goods and warehouse them in his warehouse for the Defendant.

The Plaintiffs demurred to the statement of defence on the ground that by giving his agent possession of the goods the Defendant had lost his lien.

Harding in support of the demurrer.

The Attorney-General (S. W. Griffith, Q.C., with him *Pring, Q.C.*, and *Garrick)* for the Defendant.

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LUTWYCHE, A.C.J.:—This is an action to recover damages for the detention of goods belonging to the plaintiffs, and the defendant put in a statement of defence which was demurred to, and on the argument on the demurrer before his Honor Mr. Justice Lilley, he intimated his opinion that the demurrer ought to be sustained, but gave the defendant leave to amend. He has, therefore, amended his statement of defence, and to the amended statement plaintiffs have again demurred. The portion of the statement of defence which is the subject of the demurrer lies in the 15th paragraph, where the defendant denies "that George Barnsley Shaw, in the statement of "claim mentioned, by means of the bills of lading and moneys therein "mentioned, or by any other means, obtained delivery of the said "goods from the defendant." Then it goes on to allege that "the "defendant employed the said George Barnsley Shaw (who is a "warehousekeeper) as his agent to receive and warehouse the said "goods for safe custody, and the said George Barnsley Shaw received "and had the said goods for safe custody as the defendant's agent, "and not otherwise." The demurrer to that portion of the statement of defence sets out that the averment in the 15th paragraph is bad in law on the ground "that by such receipt of the said goods by the "said George Barnsley Shaw, the master and the defendant, the owner "of the said vessel, lost their absolute and entire dominion over the "said goods." The question in this case is really very simple. Of course it was never contended, and could not be contended, that there could be two liens on the same property co-existing at the same time; and the question is whether the statement in the 15th paragraph of the defendant's statement of defence shows that the delivery was made to Shaw as a gratuitous bailee. Unless it can be successfully contended that the delivery was made to him as a gratuitous bailee the defendant's case fails. It certainly is stated in the 15th paragraph that the goods were delivered by the defendant to Shaw as his agent, but unless that allegation necessarily leads to the conclusion that he received the goods without any engagement, express or implied, to receive rent for warehousing them, then he would not be made out to be a gratuitous bailee, and the defendant having parted with the possession of the goods voluntarily, gives up his own lien and transfers the goods to the possession of a warehouseman who had, by virtue of his employment, a lien on the goods. Now it seems to me that the language of the paragraph does not necessarily lead to the conclusion that the words "as his agent" mean that Shaw received

the goods as a gratuitous bailee of the defendant. It is quite consistent with the statement in the defence that he received them in the ordinary way of practice in warehousing goods—that is, to hold them in his custody for the party depositing them with him and to receive rent for his trouble and risk in taking care of them; and if there were any doubt on the subject the statement which was introduced by way of parenthesis, "who is a warehousekeeper," may I think be fairly called in aid to determine the question of interpretation. If these words stood alone, not being used parenthetically, they would be, I think, as a description mere surplusage, but as assisting in the interpretation of a passage which may be doubtful, then these words I think may be referred to. It seems to me that the only construction the Court can put upon the defence is that the goods were delivered by Sunley to Shaw to be kept for him upon the usual terms of warehousekeepers—that is, by paying rent for their deposit. That being so, I think that the demurrer must be allowed.

LILLEY, J. :—In this case it is probable the pleader has fallen into error from the misquotation of Wilson *v.* Kymer, (1 Maule & Sel.,) which is digested in Tudor's Leading Cases on Mercantile Law. "A lien will not be lost by the goods being put into the possession "of a depositary or bailee for safe custody, as in the case of goods "put into the possession of a warehouseman or wharfinger for those "purposes." Now the essential omission there is this, that when the party having the right of lien is compelled "in obedience to revenue regulations" to place them in a warehouse for safe custody, then his lien will not be lost; but that is omitted in the digest of the case. However that may be, the defence is an attempt to set up a common law right of lien which has no connection with the mercantile law or any law relating to sufferance wharves. To that right of lien it is well known possession is essential, and it must be such a possession in the person asserting the right of lien that he is enabled immediately on the discharge of the amount of the lien to transfer his possession to the person entitled. The question has never been decided, but it would seem to be reasonable that a master or shipowner should be allowed to leave goods under certain circumstances, at a port where there is no sufferance wharf, in the hands of an agent without losing his right of lien; for instance, the holder may not be ready to accept delivery. It seems to me that the master should be enabled, at all events, to place the goods in the hands of his agent under such circumstances that he may retain his lien, and that appears to have been the

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opinion of all the judges in Mors. le Blanch *v.* Wilson, 8 L.R., C.P. 227. This then would appear to be the result of the best opinion on the subject—the question has never been decided, interesting as it is—that the goods must be left under such circumstances that the person entitled to them could immediately have the possession of them on satisfying the lien, or, in other words, the bill of lading must "be a symbol of possession, and practically the key of the warehouse," I am using the language of Mr. Justice Willes, in Meyerstein *v.* Barber. Now the judges seem to be of opinion that if, by the intervention of a new lien to which possession would be essential, an inconsistent title is raised that is a new possession and a new lien, then the original lien is lost. The question is—What does this pleading show? Does it show that there was a continuous possession of the master, or in the hands of his agent, under such circumstances that the bill of lading was practically the key of the warehouse, and that the party holding the bill of lading could obtain immediate delivery of the goods on payment of the amount of the lien? The pleading fails to show affirmatively that the goods were placed in the hands of an agent under such circumstances as to prevent the master or owner losing his lien, but the language, it seems to me, shows an entirely contrary state of things. It shows that it was a deposit in the hands of a warehousekeeper; the law immediately gave him a right of lien for his rent. There is nothing to show that they were deposited there to be free from that right of lien; the law must be attached to the pleading, and the right immediately arose. If it had been averred that they were left for safe custody, free from all charges except those due on the master's or owner's lien, and to be delivered immediately on the production of the bill of lading to the party entitled to the goods, then the pleading, it seems to me, would have been complete and sufficient. Great stress was laid upon the inconvenience which would arise to the master or shipowner who might have to remain for months in port to enable him to deliver the goods. That may be so, but the law has not left the party entirely without remedy. The master must so far preserve his control over the goods that on the payment of the lien the party entitled can obtain immediate possession. But as I have said, the law has not left the master or owner without a remedy. It may not be a sufficient remedy, but if, by the misconduct or wilful default of the party who ought to be there to receive the goods the master is obliged to warehouse them, and pay rent, he can recover in an action as damages the amount of the rent or charges

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paid out on leaving the goods for safe custody, but he could not attach the amount of the rent to the lien. In the same way by analogy to the action in the case where there is no provision as to demurrage in the bill of lading, and there is detention beyond a reasonable time, the master or owner may have damages for the detention. I think, therefore, that there must be judgment for the plaintiff on this demurrer.

The Attorney-General applied for leave to amend.

LUTWYCHE, A.C.J.:—If we allow you to amend, the affidavit should be very full and precise, and to this effect: That the defendant Shaw received the goods as gratuitous bailee, to warehouse for the defendant without any agreement, either express or implied, to receive rent for warehousing them, and that immediately after the delivery to him he would be ready on presentation of the bill of lading to deliver the goods to the party presenting it on payment of freight and other charges.

RE GRAY & CO.

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GRAY AND OTHERS.

Sept. 25.

Statement.

Insolvency.—Liquidation by arrangement.—Special resolution.—Ultra vires.—Trustees. — Delay. — Adjudication without petition. — Insolvency Act 1874, secs. 127, 202, sub-sec. 12.

By a special resolution passed at a meeting of the creditors of G. & Co. it was resolved that the affairs of the firm should be liquidated by arrangement, that all debts over £50 should be represented by bills, and that the trustees should have the right to grant renewals of the bills so that the entire liquidation should be completed within twelve months. More than two years afterwards, the liquidation not having been completed but a dividend of 17s. 6d. in the £ having been paid, the following resolutions were passed at a meeting of the creditors:—

1. "That the trustees herein be instructed to wind up the estate," and
2. "That they be empowered to pay the new liabilities of the trust "estate in full."

Held that the resolutions were not *ultra vires*.

Held also that the delay and certain alleged difficulties in winding up the estate were not, under the circumstances, sufficient grounds to warrant the Court in making an adjudication in insolvency.

APPLICATION by trustees in liquidation for directions.

Messrs. Gray & Co. having called a meeting of their creditors, the following resolutions were passed at the meeting on the 27th March, 1876:—

1. That the affairs of the said Allan Gray and David Tait the younger shall be liquidated by arrangement and not in insolvency.

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2. That Messrs. T. E. White, of Alfred Shaw and Co., and J. S. Turner, of Geo. Raff & Co., be appointed trustees.

3. That the trustees be and are hereby empowered to arrange with Messrs. Gray & Co. for the liquidation of their liabilities as follows:—Debts under £50 to be paid in cash, and all other debts to be represented by bills at one to nine months bearing bank interest, the trustees having the right to grant renewals if they think it advisable, so that the entire liquidation of the liabilities shall be completed within twelve months from 27th March, 1876.

4. That the remuneration of the trustees be 2½ per cent. on dividend paid, free of any expenses necessarily incurred.

5. That Mr. W. E. Murphy, solicitor, be entrusted with the registration of this special resolution.

The trustees proceeded with the liquidation and paid a dividend amounting to seventeen shillings and sixpence in the pound, but had not completed the liquidation on the 2nd September, 1878. At a meeting of the creditors, held on that day, the following resolutions were passed:—

"That the Trustees herein be instructed to wind up the estate," and

"That they be empowered to pay the new liabilities of the Trust "estate in full."

A portion of the creditors dissented from the resolutions, and the trustees, being in doubt whether the meeting had power to pass them, applied to the Court for directions.

The Attorney-General (S. W. Griffith, Q.C.), for the trustees, cited *The Insolvency Act* 1874, secs. 127, 132, sub-sec. 2, sec. 202, sub-sec. 9, r.r.g. 95, 211, 218, 229, 236, 238.

Harding, for Fraser & Co. and Connell, Hogarth & Co., creditors, cited *The Insolvency Act* 1874, sec. 132, sub-secs. 2, 4, 5, 7, 9, 11, 12, r.g, 187; *Ex parte* Marland (L.R., 20 Eq. 777); *Ex parte* Charlton *re* Charlton, (6 Ch., div. 45); *Ex parte* Burrell *in re* Robinson, (1 Ch., div. 537); *Ex parte* Sydney (L.R., 10 Ch. 208); *Ex parte* Browning (L.R., 9 Ch. 583); *Re* Hatton, (L.R., 7 Ch. 723).

Judgment.

LILLEY, J.:—In this case an application has been made to me by the trustees of the estate of Gray & Co. for my opinion or advice under the section of the Insolvency Act empowering them to apply to the court for assistance in that form. It appears that the estate of Gray & Co. has been in course of liquidation by arrangement under resolutions passed some two years ago. It was contended before me that these resolutions amounted to a composition; that they were

altogether *ultra vires*, or that a portion of them were beyond the scope of the section relating to liquidation by arrangement; and that they ought not to be registered. There is a great distinction between the procedure for composition and that for liquidation by arrangement. In the case of composition it may be for the creditors to accept either a smaller sum of money, or, for anything I can see in the Act, the composition may take a form different from the payment of money. In that case it is clear the estate would remain vested in the debtor, and perhaps that is the cardinal distinction between the two. Under liquidation by arrangement the property is at once vested in trustees appointed by the creditors. However, in this case no question of that kind arises, because here the creditors agreed to liquidate by arrangement, and the estate was at once vested in the trustees who were appointed by the first set of resolutions. Now a liquidation by arrangement has been said to be a mere equivalent for insolvency. I am disposed to think it has a larger meaning. It seems to me that a liquidation by arrangement is much more largely under the control of the creditors than probably it would be if the estate were brought into court upon an adjudication—certainly as to time, and probably even as to the method of winding up. The trustees under liquidation would have much more power, subject of course to the control of the creditors and the court, than they would have under the adjudication; and where no committee of inspection is appointed the section gives them their own discretion. The trustees in this case, with the acquiescence of all the creditors except one, (Bennison & Co.), carried on the business of the estate, and, probably under the direct control of the liquidating debtors, the business was carried on up to the time of passing the resolutions which are submitted to me; and so far as I can see, the whole matter was satisfactorily conducted by the trustees and the insolvents. I have been invited to make an adjudication of insolvency against the debtors, the grounds being that there are legal difficulties and delays in winding up. I am not disposed to take that view of the matter. The original resolutions enabled the creditors to continue the winding up for twelve months, and it is observable that all the creditors with the exception of those that I have named (Bennison & Co.) have acquiesced in the whole of the proceedings under the original resolutions and have received the whole of the dividends. I must take it that this was done with full knowledge of the acts of the trustees; if it was known that the trustees were doing wrong they could have complained, and I must take it that they made

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no complaint, and were assenting parties to the management of the estate up to the present time. And Bennison & Co. having assented to this last resolution, I must take it that they did so with full knowledge of the previous circumstances. Well then, the result is this, that upon the resolutions which were originally agreed to, the creditors have allowed the trustees and the insolvents to wind up the estate so far and have received a dividend of 17s. 6d., and from the facts submitted to me there is a prospect of the original debts being liquidated in full. That being the position of affairs on the 13th April, 1878, and a dividend of 17s. 6d. having been paid with interest, the creditors held a meeting and passed the resolutions submitted to me for my opinion and advice. There was assent by all the creditors except Connell, Hogarth & Co. and John Fraser & Co. I may say I think there is no appeal before me from the decision of the registrar, but I think it would be unnecessary for the registrar to register them. Here are debtors who, with the consent of the body of the creditors, for two years have gone on dealing with the estate, and have paid such a dividend as to form almost a complete payment of the debts of the creditors, and I think I should be acting wrongly in allowing the debtors to be adjudicated insolvents, or in disturbing the work already done with the consent practically of all the creditors at one time or other. I advise and direct the trustees that they do wind up the estate forthwith, speedily and diligently. Then, as to the second resolution, looking at the matter and assuming them to have done nothing forbidden in their relation to the estate amounting to a breach of trust, it seems to me to be but natural justice that the liabilities incurred in winding up the estate should be discharged in the first place, and with that caution I think this resolution amounts to nothing more than an act of natural justice, and that they be advised to discharge the new liabilities of the estate before paying a dividend on the old.

Costs of Fraser & Co., Connell, Hogarth & Co., and the trustees, to be paid out of the estate.

MAIDEN AND OTHERS *v.* MARWEDEL.

Foreign judgment.—Judgment against person not within the jurisdiction.—31 Vict. No. 17, secs. 20, 21, 22.

When a judgment of a foreign Court has been obtained in default of appearance against a Defendant who at the time the suit was commenced was not resident in the country in which the judgment was obtained, it cannot be enforced here.

Statement.

SUMMONS, calling upon the Defendant to show cause why execution should not issue upon a judgment recovered by the Plaintiffs against him in the Supreme Court of New South Wales.

Real for the Plaintiffs.

Pope Cooper for the Defendant.

Judgment.

LUTWYCHE, A.C.J.:—This was a summons calling upon the defendant to show cause why execution should not issue upon a judgment recovered by the plaintiffs against him in the Supreme Court of New South Wales, a memorial of which judgment had been filed in accordance with the Act, 31 Vict., No. 17, sec. 20. The 20th, 21st, and 22nd secs. of the Act, 31 Vict., No. 17, are transcripts of the corresponding sections of the Act, 19 Vict., No. 12, which became a part of the statute law of this colony on its separation from the parent colony of New South Wales, and which is still in force there. The action upon which the judgment was founded was brought in New South Wales against a defendant who, at the time the cause of action arose, was resident in Queensland, and who has ever since continued to reside there. He was not within the jurisdiction of the Supreme Court of New South Wales at the time the proceedings in the suit were instituted, or at any time while such proceedings were continued, and, though served with process, he did not appear to the writ. The question now raised is, whether the judgment which was afterwards signed against him in the Supreme Court of New South Wales, and subsequently made a record of this Court by filing the memorial, can be enforced against the defendant by the Supreme Court of Queensland. The question has been raised for the first time in this colony, and it undoubtedly is a question of very great importance, but it will be unnecessary to discuss at any length the principles upon which my decision must be based, as the very same question was raised in the Brisbane Oyster Fishery Co. *v.* Emerson (Knox's Supreme Court Cases, p. 80), and I entirely concur in the reasoning of the carefully considered judgment delivered by the judges of the Supreme Court of New South Wales in that case. The authorities on the subject are there fully reviewed, and the result of them, so far as it applies to the

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facts of the present case, may be stated as follows:—viz., that where a judgment of a foreign court has been obtained in default of appearance against a defendant, who at the time the suit was commenced was not resident in the country in which the judgment was obtained, such a judgment cannot be enforced here. See Schibsby *v.* Westenholtz and others, (L.R. 6 Q. B. p. 155). If the defendant had either expressly, or by implication, agreed to be sued in the Supreme Court of the colony of New South Wales the case would have assumed a different complexion, but there is nothing in the facts disclosed which imposed on the defendant a duty to obey the judgment of this foreign tribunal. He was not bound to take notice of its process, but if he had appeared and had had an opportunity of defending himself the judgment would not have been examinable here, except upon the ground of fraud or irregularity. As it appears that the judgment was obtained behind his back, I think I am bound both on principle and on authority to refuse assistance in enforcing it, and I accordingly dismiss the summons, but as the point has arisen here for the first time, I make no order as to costs.

1878.

McGHIE, LUYA AND OTHERS v. GILLIS.

Oct. 1.

Statement.

McGHIE, LUYA & CO. *v.* GILLIS.

Insolvency.—Practice.—Debtor's summons.—Security.—Balance of probability of result of action.—Insolvency Act 1874, sec. 49.

Where a debtor's summons is ordered to stand over for an action to be brought, and the Court is of opinion that the probability is as much in favor of the success of the alleged debtor as of the creditor, the Court will not order security to be given.

Decision in Ex parte Turner in re Turner, L. R., 10 Ch., App. 175, followed.

APPLICATION to dismiss debtor's summons.

Harding in support of application.

The Attorney-General (S. W. Griffith, Q.C.) for the plaintiffs.

Judgment.

LILLEY, J.:—This was an application under the 49th section of *The Insolvency Act of* 1874 made by a person who had been served with a debtor's summons at the instance of M'Ghie, Luya & Co., to dismiss such summons on the ground that he was not indebted to the creditors serving such summons, or that he was not indebted to such amount as would justify such creditor in presenting an insolvency petition against him. The summons was based on a dishonoured promissory-note, dated 19th October, 1877, and made by John Gillis, in favor of M'Ghie, Luya & Co., for £66, payable four months after date at the

Queensland National Bank, Brisbane; and the summons claimed a further sum of £2 6s. 8d. for interest from the date of dishonour of the note. The question is, whether or not the affidavits disclosed a petitioner's debt sufficient to support an adjudication in insolvency? The decision of that question must rest on the sufficiency of the consideration given for the promissory-note, for all the statements in the affidavits before me which relate to an open and unsettled account between the parties are foreign to the point at issue. On the nature of the consideration there is a direct conflict of evidence. Gillis, in paragraph 7 of his affidavit, refers to a conversation between himself and A. F. Luya, which took place on the 19th of October, 1877, from which, if it can be taken to be an accurate report of what was said, the inference must necessarily be drawn that the note was made for the accommodation of the firm of M'Ghie, Luya & Co. On the other hand, A. F. Luya states in the 6th paragraph of his affidavit that the note was really made as an acknowledgment of the balance due by Gillis on the open account between the parties, and that it was to be held as a collateral security for the payment of such account. In such a conflict of testimony the only course which is open to me appears to be to direct that all proceedings on the summons be stayed for such time as will be required for the trial of the question relating to the promissory-note. It was argued that if a stay of proceedings should be ordered, the debtor should be required to give security for the payment of the debt, and the cost of establishing it. But I think that *Ex parte* Turner *in re* Turner (Law Rep., 10 Chanc. App., p. 175) is a safe authority to follow in declining to make an order that such security should be given. I wish to avoid prejudicing the trial of the action, and therefore I express no opinion on the probability of success of either party; it is enough that there is a direct conflict of evidence. The order I make is that the proceedings on the summons be stayed until further order, and that the question relating to the alleged debt, arising out of the promissory-note, be tried before a judge of the Supreme Court at the civil sittings appointed to be held at Brisbane on Monday, the 11th of November next. Costs of the present application reserved.

1878.

RICHARDSON v. MACDONALD.

RICHARDSON v. MACDONALD.

Dec. 13.

Specific performance.—Sale of station.—Deficiency of area.—Possession by purchaser.—Confirmation of agreement.

Statement.

M. agreed to sell to R. a station containing about 700 square miles of pastoral country. R. took possession of about 300 square miles, and afterwards M. proved unable to transfer the remainder of the 700 miles, and refused to transfer any part of the run unless R. would accept the 300 square miles in full performance of the agreement and pay the purchase money for the whole without abatement.

Held that R. had not by taking possession of part of the run confirmed the agreement as relating to the part only.

DEMURRER to statement of claim for specific performance of an agreement for the sale of a station.

The Attorney-General (S. W. Griffith, Q.C.) and *Real* in support of the demurrer.

Harding and *Swanwick* for the Plaintiff.

Judgment.

LUTWYCHE, A.C.J.:—This was an action for the specific performance of an agreement by the defendant to sell the Moornish station, in the Gregory district, containing an area of nearly 700 square miles of pastoral country, and claiming an abatement in the purchase moneys of £5000, in proportion to any deficiency in the area delivered and transferred. The statement of claim sets out that the defendant was the holder, under the *Pastoral Leases Act*, of nine runs or blocks of country, to the whole of which runs or blocks, together with certain others which the defendant claimed on June 1, 1877, but had not then or since obtained on lease from the Crown, the defendant applied the general name of the Moornish runs or stations. The statement of claim proceeds to set out an offer from the defendant of the Moornish runs, containing nearly 700 square miles of the best pastoral country in the Gregory district, for the sum of £5000. The statement of claim also sets out the plaintiff's acceptance of the offer, his receipt of a sale note from the defendant's agents, of the Moornish stations, and the plaintiff's entry in September, 1877, upon six of the blocks in question, containing an area of about 319 square miles, of which he took possession and stocked as part of the Moornish station. The statement of claim further alleges the refusal of the defendant to transfer any part of the country or runs unless the plaintiff consents to accept the runs of which he is already in possession, containing an area of 319 square miles, in full performance of the defendant's contract of the 1st of June, 1877, and pays to the defendant the full sum of £5000, without any allowance by way of compensation or abatement in purchase money on account of deficiency in area. The defendant has demurred, but confines his demurrer to so much of the

plaintiff's statement of claim as seeks specific performance of the agreement of June 1, 1877, including more than the first six runs, already in the possession of the plaintiff, on the ground that having taken such possession he has thereby put it out of the power of the court to place the defendant in the same position in which he was before, and that he has elected not to avoid the contract, and has confirmed it as relating to the first six runs only. The general rule relating to specific performance, as laid down in Hill *v.* Buckley, (17 Vesey, 394,) is that the purchaser shall have what the vendor can give, with an abatement out of the purchase money when the quantity falls short of the representation. Cases may occur when it may become necessary to engraft exceptions on this rule, and some were cited at the bar by way of illustration, but on examination none of them appear to go to the extent which is required to support the grounds of the defendant's demurrer. Price *v.* North, (2 Y. and Coll. Exch. 620,) was decided on the ground of acquiescence in the sale for four years by the only one of the purchasers who was afterwards dissatisfied. In Wheatley *v.* Slade, (4 Sim. 126,) the court refused to decree a specific performance where the title to a large portion of the estate contracted to be sold could not be made good, as there was a lien on the property which would exhaust nearly the whole of the purchase money. Lord St. Leonards has expressed disapproval of the decision, in Maw *v.* Topham, (19 Beav. 576,) which however, as pointed out in Dart's V. and P. 3rd edition, p. 576, appears to have turned on the investment of trust money on the security of the vendor's interest to an amount exceeding what would have been payable by the purchaser if successful in his claim for an abatement. The Earl of Durham *v.* Legard, (34 Law J. Chan. 589,) was a clear case of mutual mistake; and in Davis *v.* Shepherd, (Law Rep., 1 Chan. App. 410,) it was obvious that at the time of making the contract neither party to it contemplated the additional area which was the subject of contention. In the case now before the court no mistake of any kind has been made. The parties to the agreement have entered into it with their eyes open, and upon the facts admitted by the demurrer the defendant has failed to show that the plaintiff may not be entitled to relief. The nature and extent of the relief will be determined by the court in the exercise of its discretion at the hearing; at present, all that can be done is to overrule the demurrer, with costs.

Attorney for the Plaintiff, *G. V. Hellicar.*

Attorneys for the Defendant, *Macalister and Mein.*

1878.

HUNTER v. SUNLEY.

HUNTER v. SUNLEY.

Demurrer.—Lien.—Continuous possession.—Warehouseman.—Agent.—Argumentative pleading.—Costs.

Dec. 13.

Statement.

It is usual for a warehouseman to receive special payment for warehousing goods, and therefore an allegation that a person received goods as a warehouseman to warehouse them raises the presumption that he was to be paid for receiving them; while an allegation that a person received goods as an agent does not raise such a presumption. Consequently, if a pleading which sets up a right of lien allege that after the right accrued the person claiming the right delivered the goods to a warehouseman to warehouse without averring that the bailment was gratuitous, the pleading will be bad; but if the character of the bailee be stated to be that of an agent merely, such an averment is not essential.

If a party plead argumentatively, and the pleading be demurred to, he will probably not be allowed his costs on the argument of the demurrer, though successful.

DEMURRER to statement of defence.

Harding in support of the demurrer.

The Attorney-General (*S. W. Griffith, Q.C., Pring, Q.C., and Garrick* with him), for the Defendant.

Judgment.

LUTWYCHE, A.C.J.:—This case came before the court on Wednesday, the 11th instant, upon a demurrer by the plaintiff's to the defendant's amended statement of defence. The action was brought for return of certain goods, or their value, and damages for their detention. The plaintiff claimed the property of the goods in question, which had arrived in the ship *Rockhampton*, by virtue of a bill of lading, of which the plaintiff was the holder and assignee. Besides the goods described in the plaintiff's bill of lading, other goods, belonging to other owners, had been put on board the *Rockhampton*, and during the voyage, owing to stress of weather, large portions of the cargo, the property of such persons, were jettisoned. After setting out these facts in the statement of defence, the defendant alleged that he had a right to detain the plaintiff's bill of lading until a general average contribution was duly adjusted and satisfied, and that the plaintiff had prevented the general average contribution from being ascertained and adjusted; and on this ground he justified the detainer of plaintiff's goods until such general average contribution had been adjusted and satisfied. This ground of defence was not adverted to in argument at the bar, but as the facts are admitted by the demurrer, the defence is good in law. The defendant in his statement of defence claims, in addition to his right of detainer for general average, a lien upon the goods for freight, which he alleges

has not been paid; and he further says, in his statement of defence, that after the arrival of the goods in question, they were delivered to one G. B. Shaw, for safe custody, as the defendant's agent, and that they have always since their arrival remained in the possession and under the sole control of the defendant. Although this part of the defendant's statement of defence cannot be regarded as an example of skilful pleading, we think that upon the whole it may be gathered by necessary implication that the defendant meant to deny the plaintiff's right to the delivery of the goods under the bill of lading, but though such a denial may be collected from the words used, they amount to an argumentative denial, which under the old rules of pleading would have been held to be a bad plea, and which, though now permissible, does not invite encouragement from the court. The defendant has remained in the continuous possession of the goods since their arrival, for the custody of the agent is the possession of the principal. The custody in this case appears to amount to the first sort of bailment described by Lord Holt in Coggs *v.* Bernard, viz.:— a bare naked bailment of goods delivered by one man to another to keep for the use of the bailor. Scott *v.* Newington, (1 Mo. and Rob. 252,) which was so much relied upon by the counsel for the plaintiff, has no application here. If the defendant had abused his lien by pledging his goods, the case cited would have been in point. And there is no ground for the contention which was argued by the plaintiff's counsel, that the custodian of the goods was entitled to remuneration for his services. In deciding Whitehead *v.* Sunley, the judgment of the court proceeded upon the ground that Shaw was employed not only to receive but to warehouse the goods as defendant's agent, and that consequently they were to be kept for him upon the usual terms of paying rent for their deposit. We adhere to that decision, although doubts have been expressed at the bar whether a warehousekeeper is by law entitled to a lien upon goods deposited with him as a warehouseman. The doubts have properly arisen from some degree of confusion about the extent of a warehouseman's particular lien and a general lien, which depends on custom or agreement. We have yet to dispose of the question of costs. That is now entirely a question for the discretion of the court. We quite concur with several eminent English judges in thinking that it is necessary to observe great strictness in carrying out the new system of pleading introduced by the *Judicature Act*. Now, the 14th paragraph of the defendant's statement of defence,

1878.

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Dec 13.

Judgment.

which purports to be amended pursuant to an order of the court, dated the 30th October last, appears to us to present merely a colorable amendment, and to retain the same objectionable features which it had before the amendment was ordered to be made. Although, therefore, it is our duty to order judgment upon the whole record, each party will pay his own costs of the demurrer.

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ADMINISTRATION. — Executor—Trustee—Breach of Trust — Waste — Liability — Accounts.] S. by his will gave the profits of his real estate, and of his horses and cattle, for the support of his wife and of his son T. until the latter arrived at the age of 21 years. The cattle and horses were then to be delivered to T. as his property, and at the death of M. the real estate also was left to T. The testator gave his executors power to sell any part of his real estate, or to borrow money on it, for the support of M. or T., or if they should think it desirable for the more effectual carrying out of his intentions; and directed that any instrument for conveying the fee simple, or for borrowing money by mortgage, was to be as valid as if he had executed it in his lifetime. H. and C. were appointed executors of the will. S. died during the minority of T., and from the time of his death until soon after T. attained his majority, the management of the property devised to M. and T. was mainly conducted by H., C. taking an active part in only two or three transactions, but from time to time receiving information from H. concerning the management. During the infancy of T. a portion of the real estate was mortgaged by H. and C., but it was alleged by C. that he never knew what became of the money. Another portion was leased to H. at an inadequate rent, and the estate was wasted to a considerable extent by T., with the knowledge of H. and C., neither of whom interfered to prevent it. After T. came of age he and M. executed a release discharging C. from all liability in respect of the trust, but no accounts were produced to them by H. or C. either before or at the time of the execution of the release.

Held, that C. had accepted the duties of executor and was responsible for the waste of the estate.

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Held, that in order to entitle the Attorney-General to the relief claimed, it would be necessary to prove facts which would show that S. had incurred a forfeiture of the land under section 128 of the Act, and render him liable to a prosecution for a misdemeanor under sections 127 and 129 of the Act, and that therefore S. could not be compelled to make a further and better answer.

Section 57 of *The Crown Lands Alienation Act of 1868* does not imply a contract by the lessee to disclose to the Government the extent to which he has complied with the covenant and conditions of his lease.

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COMPANY.—*Demurrer—Insolvent Company—Preference—Trustee—Principal and Agent—Surety—27 Vict. No. 4, sec. 165—38 Vict. No. 5, secs. 107-9.*] Statement of claim of Plaintiff Co. alleged that P., G., S., and Pr. were directors of the Company, and were personally liable to the Bank of N.S.W. in the sum of £7,500. C., by the request of the directors, advanced the amount necessary to pay off the debt, and took as security for the repayment of the advance a mortgage of the whole of the Co's property for £3,500, and the joint promissory notes of P., G., S., and Pr., B. and W., for the balance. Two months afterwards, C. foreclosed and sold the Co.'s property, and out of the proceeds of the sale discharged his mortgage debt, and by the direction of the directors applied a portion of the remainder to the satisfaction of the debt secured by the promissory notes, and interest, amounting altogether to £4,164. At

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the time of the sale and the application of the proceeds the Co. was to the knowledge of all the parties in a state of insolvency. Eighteen months afterwards, an order was granted for the winding up of the Co., and an official liquidator appointed. The Plaintiff Co. claimed an account and a declaration of the rights of the parties respecting the proceeds of the sale, and that the payment of the £4,164 was void.

C., in his statement of defence, alleged that with the knowledge of the directors of the Plaintiff Co. the C. Banking Co. advanced to him the money which he lent to the directors of the Plaintiff Co. under an agreement, the terms of which were known to the directors of the Plaintiff Co., and under which he was bound to deposit the mortgage and promissory notes with the Bank, and that they were so deposited; that the sale was effected in accordance with the agreement and the money applied as stated under the directions of the directors, none of it having been received by C., except a commission for his trouble.

Upon demurrer by Plaintiff Co. to this part of the statement of defence,

Held, that the allegations demurred to were not demurrable.

Upon demurrer by B. & W. to the statement of claim,

Held, that B. & W. having been merely sureties for C., and there being no suggestion of their having been parties to the alleged preference contained in the statement of claim, they ought not to have been made defendants.

Upon demurrer by P., G., and S., to the statement of claim,

Held, that notwithstanding that it appeared by the statement of claim that the debt paid out of the proceeds of the sale of a debt of the Co., and that the petition for winding up the Co. was not made within six months after the date of the payment and application of the proceeds, the statement of claim was not on that ground demurrable 32

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One of two or more trustees in a liquidation cannot act without the others unless the creditors, on appointing them, direct that he may.

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